92-2016

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GROVER C. JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Of Counsel for Grover C. Jones, Jr.
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52 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals err in summarily affirming the district court's findings that the simultaneous representation by Petitioner's counsel, of the Petitioner and the First Assistant U. S. Attorney, Chief of the Criminal Division, who prosecuted the Petitioner, did not constitute an actual conflict of interest requiring reversal of Petitioner's conviction?

2. Did the Court of Appeals err in summarily affirming the district court's findings that the Petitioner Jones at an ex parte hearing on May 12, 1987, executed a valid waiver of his right to conflict free counsel?

DESIGNATION OF PARTIES

The parties to the appeal before the United states Court of Appeals for the Fourth Circuit were the Petitioner, Grover C. Jones, Jr., and the Respondent, the United States of America. Said parties are the same as were before the court of original jurisdiction, the United States District Court for the Southern District of West Virginia.

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OPINIONS BELOW

The unpublished opinion of the Fourth Circuit Court of Appeals of October 15, 1992, sought to be reversed is reproduced in the Appendix at 1. An Order on Rehearing which was unpublished was issued in the case by the Court of Appeals on February 16, 1993, and is reproduced in the Appendix at 3. The District Court's findings and order which is relevant to the issues raised was entered September 24, 1991 is unpublished and reproduced in the Appendix at 5.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The Court of Appeal's judgment was entered February 23, 1993, and is reproduced in the Appendix at 17. A Petition for Rehearing with suggestion for in banc was timely filed. Petitioner's in banc motion was denied by Order of February 16, 1993. The instant petition for Writ of Certiorari was timely filed pursuant to Rule 13.2 of the Supreme Court Rules. The Petitioner upon proper motion dated April 20,

1993, was granted an extension of time within which to file his Petition for a Writ of Certiorari by this Honorable Court to June 16, 1993.

CONSTITUTIONAL PROVISIONS, STATUTES AND CODES OF PROFESSIONAL ETHICS INVOLVED

The instant matter involves the Fifth Amendment and Sixth Amendment to the United States Constitution which are reproduced in the Appendix at 18-19.

Title 18 U.S.C. §208(a) relevant to the issue is reproduced in the Appendix at 19.

Rule 44 (C) of the Federal Rules of Criminal Procedure relevant to the issue is reproduced in the Appendix at 19.

28 C.F.R. §45.735-4 relating to disqualification of employees of the Department of Justice arising from personal or political relationship, relevant to the issue is reproduced in the Appendix at 20.

28 C.F.R. §45-735-5 relevant to the issue is reproduced in the Appendix at 20.

Local Rule (h) of the Local Rules of the U. S. District Court For The Southern District of West Virginia relevant to the issue is reproduced in the Appendix at 20.

The ABA Code Of Professional Responsibility DR 5-101(A), DR 5-105(A) and DR 5-105(B) on simultaneous representation adopted by local rules of the U. S. District Court and by the Supreme Court of Appeals of West Virginia revelant to the issue is reproduced in the Appendix at 21.

The ABA Defense Function Standards, Sections 4-3.5(a) and 4-3.5(b), on Simultaneous Representation relevant to the issue are reproduced in the Appendix at 21.

ABA Standards for Criminal Justice Sections 3-1.2 and 3-2.10 which apply to prosecutors are reproduced in the Appendix at 22.

The Model Rules On Simultaneous Representation relevant to the issue is reproduced in the Appendix at 22.

The ATLA Code On Simultaneous

Representation, Rule 2.1 and 2.4, relevant to the issue are reproduced in the Appendix at 22.

STATEMENT OF THE CASE

The following bizarre scenario is illustrative of the old but true story of the horrible consequences which result when the judicial fails in its solemn duty to uphold the law, and instead becomes enmeshed with corrupt political forces. In the within case, the actions have enabled the Petitioner's political foes to keep him senselessly imprisoned for nearly seven (7) years.

The disturbing aspect of it all is that the entire judicial staff of the Fourth Circuit Court of Appeals is aware of the fact of Petitioner having been the victim of a trial which was fundamentally unfair and have kept their silence.

The Petitioner, Grover C. Jones, is a former criminal attorney of Monroe County, West Virginia, who also served for a term as a state prosecuting attorney for said county. He fell

into disfavor with the political factions in the county and state when on September 6, 1984, he filed a petition in the Circuit Court of Monroe County charging government corruption. .

On October 14, 1984, the political forces whom he had opposed met with a convicted felon, John Whitlow, the government's star witness against Petitioner, at the private residence of a former U. S. Attorney and concocted a plan to frame Petitioner by having the convicted felon agree to falsely implicate the Petitioner in the within alleged mail fraud scheme. A tape recording secretly made by a state police officer who was present at the October 14, 1984, clandestine meeting and which recording exculpated Petitioner was suppressed by the government and has been the subject of a cover-up by the government and Petitioner's own counsel who are guilty of actively representing intolerable conflicts of interests as herein revealed.

Three days after the clandestine meeting at

the home of the former U. S. Attorney, forty-one (41) days after the filing of above Monroe County Petition, the Petitioner, who had an impeccable record, was arrested on the 17th day of October, 1984, and charged with the within mail fraud offense.

A federal grand jury returned a five count mail fraud indictment against Jones and three (3) others on November 20, 1984, in violation of 18 U.S.C. §1341. A superseding indictment was returned on December 14, 1984 against Jones.

By Order of April 3, 1985, the Trial Judge dismissed the indictment against Petitioner for violation of the Petitioner's rights under the Speedy Trial Act. The government sought a new indictment and the grand jury returned another indictment on June 25, 1985, naming no defendants other than Petitioner Jones but alleging the same facts against him as had been previously charged. The indictments alleged that the four (4) defendants, aided and abetted by each other, knowingly used the mails or

caused them to be used to deliver insurance-related documents for the purpose of executing a fraudulent scheme to collect insurance proceeds as a result of a fire loss. The alleged scheme was unsuccessful and involved no monetary loss, no victim.

On the 12th day of July, 1985, Attorney H. L. Kirkpatrick was appointed by the Court to represent Petitioner and then on March 12, 1986, the Court appointed Attorney Kevin Burgess to assist Kirkpatrick in the representation of Petitioner which said representation continued from said dates to the conclusion of plea bargain hearings hereinafter discussed which were conducted through June 5, 1986.

Extensive plea negotiations were engaged in between the prosecution and the Petitioner commencing on or near April 25, 1986, and on the 19th day of May, 1986, a plea agreement was reached which would expose Petitioner to a maximum of five (5) years of imprisonment under the "old parole guidelines". App. at 31.

Prosecutor Wayne Rich breached the agreement by having his Assistant U. S. Attorney, Richard Glaser, call Petitioner's court appointed lawyer, H. L. Kirkpatrick, and tell him:

> "I believe I directed that he call Mr. Kirkpatrick and tell him it (the plea agreement) hadn't passed the mustard in the office." App. at 37.

The Petitioner by his court appointed counsel, Kirkpatrick and Burgess, filed a motion for enforcement of the plea agreement reached and the Petitioner believing he needed counsel with more expertise to deal with the serious choices facing him made arrangements on or about June 1, 1986, for the employment of Arthur T. Ciccarello and his associate Robert Martin of the law firm of Lewis, Ciccarello and Friedberg of Charleston, West Virginia, to represent Petitioner in his criminal proceedings and for the particular purpose of advising Petitioner in the proceedings involving a plea bargain and related transactions which encompassed the period from on or about June 1, 1986, through June 20, 1986.

Petitioner's newly retained counsel, Ciccarello and Martin, did not disclose to Petitioner the critical fact that at the precise time of their employment to represent Petitioner, (on or near June 1, 1986), said counsel were simultaneously representing Petitioner's prosecutor, the said Wayne A. Rich and Rich's wife, Regina Rich, in a civil controversy which would ultimately involve in litigation the sum of $587,896.00. A letter of May 23, 1986, a copy of which Petitioner obtained on or near June, 1991, evidences the attorney-client relationship which did in fact exist at the time of the employment of Ciccarello and Martin and during the critical plea bargain hearings and negotiations of June, 1986, between Petitioner's counsel, Ciccarello and the government's prosecutor, Wayne A. Rich. [1]

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[1] It is noted that Counsel Ciccarello makes reference to FAUSA Wayne Rich and his wife, Regina, five (5) times in said communication as "my clients". App. at 37.

App. at 38.

The fact of the employment of Petitioner's counsel by the government's prosecutor was suppressed and concealed from Petitioner and the Court by Petitioner's counsel and the prosecution for approximately one (1) year from June 1, 1986, until on or about May, 1987, shortly prior to the commencement of Petitioner's criminal trial proceedings which commenced on June 8, 1987), after the Petitioner, based on the advice of his retained counsel, Ciccarello and Martin, had closed the door on a plea bargain found by the Court. App. at 40.

On the 10th day of June, 1986, the Court found that a plea agreement had been reached between Petitioner and the government. App. at 41.

The Petitioner was granted only two (2) days within which to accept or reject the plea agreement found by the Court to have been consummated. App. at 55.

On the 12th day of June, 1986, Counsel, Robert P. Martin, made the first official appearance in these for a hearing in the U. S. District Court at Beckley, West Virginia, specifically to address the plea agreement found by the Court and to seek additional time to consider the plea bargain involved. App. at 57. On said date of June 12, 1986, **Counsel Martin announced to the Court that previous to the hearing he had conversed with First Assistant U.S.Attorney, Wayne A. Rich, Jr.,** leaving no doubt as to FAUSA Rich's participation in and supervisory functions in the proceedings as Chief of the Criminal Division.

COUNSEL
ROBERT MARTIN: "Your Honor,last night I talked with First Assistant United States Attorney Wayne Rich a-bout the matter and I told him I wanted as much time as I could because of the history of this case and he suggested that two to three weeks would not be unreasonable....."
(Transcript of June 12, 1986) App. at 57.

COUNSEL
ROBERT MARTIN: "**[I] would like to ask the Court that you extend the deadline for Mr. Jones's acceptance or**

> **rejection of that plea for some period of time as you determine to be reasonable in order that our client is not prejudiced by the loss of a potentially good deal that has been offered."** (Transcript of June 12,1986.) App. at 58.

Based upon Martin's motion, the Court by oral order of said date of June 12, 1986, granted Petitioner and his counsel only three (3) days of additional time, (from June 12th, 1986, until June 15, 1986), within which to accept or reject the plea agreement. App.at 59.

Counsel Ciccarello and Martin after a consultation with their own client, FAUSA Rich, to obtain his input into whether Trial Judge Hallanan might grant Petitioner probation should he accept the plea bargain, advised the Petitioner by telephone on Monday, June 15, 1986, to reject the plea agreement which Petitioner did comply with by letter of said date of June 15, 1986, dictated by Counsel Robert Martin. App. at 40. Petitioner could not have been sentenced for more than five (5) years under the plea agreement compared to a sentence

of twenty-five (25) years (with ten year suspended) which was ultimately imposed by Judg Hallanan.

The government prosecutor, Rich, ha testified as a hostile witness in thes proceedings at the plea bargain hearings of Jun 3rd and 4th, 1986 and was cross-examined b Petitioner's then counsel, H.L. Kirkpatrick. Further, Prosecutor Rich was scheduled to b called as a hostile witness by Petitioner durin the within mail fraud trial proceedings t testify as to his knowledge of the cover-up an suppression of a highly exculpatory tape recording evidencing the frame-up of Petitioner on the charges alleged. App. at 60-61. **This would have required Petitioner's Counsel, Ciccarello and Martin, to have cross-examined their own client, FAUSA Rich, an impossible task.**

Ciccarello and Martin were aware that on the 10th day of June, 1986, during the above plea controversy in which Ciccarello and Martin

had participated, Petitioner Jones had filed a motion to disqualify FAUSA Wayne Rich in these mail fraud proceedings, App. at 62, and that on the said 10th day of June, 1986, the government by Prosecutor Rich and AUSA Miller filed a Response to Petitioner's motion resisting Petitioner's efforts to disqualify FAUSA Rich. App. at 64. Said counsel, Ciccarello and Martin, shared with Petitioner the Court's Order of the 20th day of June, 1986, from the District Trial Judge, Hallanan, denying Petitioner's motion to disqualify the government prosecutor, Rich, and sustaining the government's position that FAUSA Rich be allowed to continue as prosecutor in said criminal trial proceedings. App. at 66.

Approximately two months after the above, to-wit, on August 20th, 1986, Petitioner's Counsel, Ciccarello and Martin, secretly and clandestinely (with cover-up by the government and the Chief of the Criminal Division, First Assistant U. S. Attorney Rich), filed a civil

action in the Circuit Court of Kanawha County, West Virginia, on behalf of FAUSA Rich and his wife, against Custom Design and Construction, Inc. App. at 69. An Answer and Counter-claim were subsequently filed in these in which the sum in controversy was $587,896.00 and in which Petitioner's counsel had an interest. App. at 73. **To the present date, the government has failed to disclose the intolerable conflicts reposed in its Chief of the Criminal Division, who headed the Petitioner's prosecution, First Assistant U.S. Attorney, Wayne A. Rich.**

The Petitioner represents and has demonstrated in his appeal to the Fourth Circuit that the above, even without going further, unequivocally demonstrates actual intolerable conflicts of interests, reposing in Petitioner's counsel and the government's prosecutor, Rich, which adversely affected counsel's representation requiring reversal of Petitioner's conviction. But it does not stop here.

The conflicts broadened invoking the necessity for the exercise by the Trial Judge of her supervisory powers to assure unto the Petitioner his Sixth Amendment Constitutional right to be effectively represented, when the Court on May 8, 1987, by a motion to withdraw filed by counsel, (App. at 78.), and again on May 12, 1987, at an ex parte hearing by an admission of Counsel Ciccarello, was placed on notice of the apparent intolerable conflicts. App. at 82. Nevertheless, the Trial Judge failed in her duties to sua sponte conduct an inquiry or waiver hearing, permitting the trial of Petitioner to continue resulting in Petitioner's unlawful conviction.

The limited disclosure by Petitioner's counsel came approximately 11 1/2 months after their employment by Petitioner, and then only after Petitioner Jones, acting upon a "tip" that his counsel might be representing serious conflicting interests, confronted Ciccarello with same on May 7, 1987. On the following day,

to-wit May 8, 1987, Ciccarello and Martin filed their motion to withdraw as Petitioner's counsel and requested an in camera hearing before the Trial Judge on said motion **so that none of the statements or testimony elicited by the Court or given to the Court could be used in any way against the Defendant, (Petitioner herein).** App. at 81.

An in camera (ex parte) hearing was conducted by the Court on the 12th day of May, 1987, on Ciccarello's and Martin's Motion to Withdraw during which Ciccarello for the first time acknowledged to the Court and to Petitioner that he represented the Chief of the Criminal Division, FAUSA, Wayne A. Rich, Jr.

ATTORNEY CICCARELLO: "[w]e represent and have represented in a civil action Mr. Wayne Rich..." App. at 85.

"In,in (sic) addressing a letter to me and to Mr. Martin, Mr.Jones had indicated that, that (sic) we represented the Assistant U. S. Attorney, and that might possibly be a conflict." App. at 85.

Counsel did not advise Petitioner or the Court that on the 20th day of August, 1986, as aforementioned they had filed a civil action on behalf of the government prosecutor, Rich, and his wife in the Circuit Court of Kanawha County, West Virginia, and that an Answer and Counter-claim had been filed involving more than one half million dollars in controversy, on the contrary, alleging that their representation was limited.

(May 12, 1987, ex parte hearing)

ATTORNEY CICCARELLO: "I have explained to him (Mr. Jones) our representation of Mr. Rich and the limitation of that representation..." App. at 85-86.

Petitioner's trial was by jury which commenced June 8, 1987, and on June 18, 1987, ended in the conviction of Petitioner on all counts. On July 30, 1987, the Court imposed upon Petitioner a term of imprisonment of twenty-five (25) years with ten (10 years suspended.

Jones filed a timely notice of appeal to the U. S. Court of Appeals for the Fourth Circuit which was denied October 17, 1989. Certiarari was denied.

Acting on the basis of newly acquired evidence demonstrating that Petitioner's Counsel, Ciccarello and Martin, had concealed irreconcilable conflicts of interest and misrepresented the limitations of their representation of the Chief of the Criminal Division, FAUSA Rich, at the ex parte hearing of May 12, 1986, the Petitioner filed his Title 28 U.S.C. §2255 and Rule 33 Motions on August 13, 1990, setting forth the relief requested and seeking to have reinstated his Title 28 U.S.C. §2255 Motion filed March, 1988, dismissed at Petitioner's request December 20, 1988, without prejudice. (Attorney Ciccarello had advised Petitioner during the May 12, 1987, ex parte hearing that FAUSA Rich and his wife, Regina, were divorcing and dividing their property; that it was actually Rich's wife whose interests

Ciccarello's firm represented and that it was only because FAUSA Rich's name appeared on the deed to the Richs' house and other documents that necessitated the involvement of FAUSA Rich in the civil controversy and which civil controversy represented to Petitioner was not an adversary proceeding. Ciccarello's representation is corroberated in the Counterclaim filed in the FAUSA Rich civil action herein discussed. App. at 76.)

August 22, 1990, the Petitioner's above said Motions were referred by Trial Judge Hallanan to United States Magistrate Judge Jerry Hogg for evidentiary hearings thereon and/or for findings of fact. The government did not file a Response to the Petitioner's Title §2255 Motions, until the 14th day of February, 1991. On the 1st day of April, 1991, the Petitioner mailed his Reply to said Response and moved for Summary Judgment and Default.

On the 15th day of May, 1991, the U.S. Magistrate Judge issued his Report-

Recommendation to the U.S. District Judge denying evidentiary hearings on all issues raised, recommending dismissal of Petitioner's Title 28 U.S.C. §2255 Motions. On the 24th day of May, 1991, the Petitioner filed his initial objections to said Report-Recommendation and on the 27th day of May, 1991, filed (Supplemental) Objections to the said Report-Recommendation.

On the 24th day of September, 1991, the Trial Judge issued an Order affirming the Report-Recommendation of the Magistrate Judge and denying unto Petitioner evidentiary hearings.[2] App. at 5.

On the 15th day of June, 1992, the Petitioner timely filed a formal brief in appeal of the District Court's Order of September 24th,

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[2] The District Court's orders of February 12, 1992, and March 20, 1992, referred to in the Court of Appeals opinion of October 15, 1992, are post-judgment orders which are of little or no relevancy to the issues herein. App. at 1.

1991, and on the 27th day of August, 1992, the Petitioner filed an amended brief in appeal of said actions of the Trial Judge which was accepted by the Court in the stead of Petitioner's brief of June 15, 1992. The government did not file a brief in response to the Petitioner's appeal brief of August 27, 1992. On the 15th day of October, 1992, Petitioner's appeal was summarily denied by the United States Court of Appeals for the Fourth Circuit. App. at 1. On the 29th day of October, 1992, the Petitioner filed a motion in banc with said Court of Appeals. On the 16th day of February, 1993, (approximately sixteen (16) weeks after the filing of Petitioner's in banc motion), Petitioner's in banc motion was summarily denied. App. at 3. The Judgment of the Court of Appeals was filed February 23, 1993. App. at 17. The Petitioner has a basis for believing that political pressure from his political enemies in West Virginia was brought to bear upon an Appellate Judge from Charleston,

West Virginia, who served upon Petitioner's panel which denied his Appeal, to influence the outcome of same. On October 1, 1990, the Petitioner filed a motion with the Court of Appeals for the disqualification of the subject judge, The Honorable K. K. Hall, (who is aligned with Petitioner's political foes of the State of West Virginia and is from the same general area where Petitioner resided), which denied same without a hearing.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Court of Appeals erred in summarily affirming the District Trial Court's Order of September 24, 1991, denying unto the Petitioner evidentiary hearings and finding that the simultaneous representation by Petitioner's counsel, Ciccarello and Martin, of the government's prosecutor, First Assistant U. S. Attorney, the Chief of the Criminal Division, Wayne A. Rich and Petitioner, Grover Jones did not violate Petitioner's Sixth Amendment right to the effective assistance of counsel free of

conflicting interests and his Fifth Amendment rights to due process, rendering Petitioner's conviction of June 18, 1987, in the U. S. District Court for the Southern District of West Virginia unconstitutional. App. at 5.

It has been clear, since the decision by the United States Supreme Court of Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942) that a criminal defense attorney's conflict of interest may rise to the level of constitutional ineffectiveness.

The Glasser Court, (supra), reasoned that:

> "the assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by...one lawyer simultaneously representing conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."
> Where a constitutional right to counsel exists, our **Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.**(emphasis supplied); Cuyler v. Sullivan,446 U.S.335 64 L.Ed. 2d 33,100 S.Ct. 1708,(1980);Holloway v. v. Arkansas,435 U.S.475, 481 55 L.Ed.2d 220, 101 S. Ct. 1097 (1981);

The Supreme Court in Strickland v.

Washington, 466 U.S. at 692, (1984) stated:

> "When counsel is burdened by an actual conflict of interest...counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." See Satterwhite v. Texas, 100 L. Ed. 2d 288-289, (1988); See also Hoffman v. Leeke, 903 F. 2d 280 (4th Cir. 1990).

See Zuck, v. Alabama, 588 F.2d 43 (9th Cir. 1979), citing Garcia, 517 F.2d 272, 276 (5th Cir. 1975), which Petitioner urges closely parallels his case, held:

> "[w]here retained law firm which served as counsel to petitioner in a murder trial also represented the state prosecutor in an unrelated civil matter there was an actual conflict of interest and such conflict of interest rendered the trial fundamentally unfair". at 436.

The Court of Appeals decision is in conflict with this Court's opinions in the controlling cases of Glasser v. U. S., (supra); Chapman v. California, 504 F. 2d 1243, 1245 (5th Cir. 1974), 386 U. S. 181 L. Ed. 2d 705; Holloway v. Arkansas, (supra); Cuyler v. Sullivan, (supra); Wood v. Georgia, 450 U. S. 261, L. Ed. 2d 220 101 S. Ct. 1097 (1981); Strickland v. Washington, (supra); Young v. U.

S. ex. rel. Vuitton Files, S. A. 481 U. S. 787, (1987); U. S. v. Cronic, 466 U. S. 659, 104 S. Ct. at 2051; Burger v. Kemp, 483 U. S. 776, 783 (1987); and Wheat v. U. S., 486 U. S. 153, 159, 100 L. Ed. 2d 140 108 S. Ct. 1692, (1988); **The Court of Appeals's decision is in conflict with its own decisions**; U. S. v. Ramsey, 661 F. 2d 1013, (4th Cir. 1981); U. S. v. Schell, 775 F. 2d 559 (4th Cir. 1985); U.S. v. Akinseye, 802 F. 2d 740 (4th Cir.1986);Hoffman v. Leeke, (supra); U. S. v. Tatum, 943 F. 2d 370, (4th Cir. 1991); and **the Court of Appeals' decision is inconsistent with the decisions of other Court of Appeals** as hereinafter stated in regard to the interpretation of the Fifth Amendment rights to due process and the Sixth Amendment right to conflict free representation.

A. The Counseling Of Petitioner Jones During Plea Bargaining Processes By His Retained Counsel, Who Were Simultaneously Representing The Government Prosecutor,Constituted An Actual Conflict Of Interest Which Adversely Affected Their Representation of Petitioner, Rendering Petitioner's Conviction Unconstitutional

It is fundamentally unfair and a

violation of Petitioner's Sixth Amendment right to conflict free counsel as presented in the Statement of the Case, (supra), for Petitioner's counsel to enter into plea negotiations and the advisement of Petitioner as to acceptance or rejection of a plea agreement, determined by the Court, while counsel are simultaneously representing the government's prosecutor with whom they are negotiating, in a $587,896.00 civil matter, and a subsequent conviction and imprisonment of the Petitioner following the rejection of the plea agreement on the advice of said counsel is unconstitutional.

Counsels' active representation of conflicting interests adversely affected their representation of Petitioner.

See Cuyler v. Sullivan, (supra); Strickland v. Washington, (supra); Burger v. Kemp, (supra); Holloway v. Arkansas, (supra); Hoffman v. Leeke, (supra).

> **"To assess the impact of a conflict of interest on the attorney's options, tactics, and decisions in plea negotiations would be virtually impos-**

sible." (emphasis supplied) Holloway, (supra), at 438.

B. Because The Trial Judge Failed To Conduct A Rule 44(C)(Garcia) Hearing Pursuant To Rule 44 Of The Federal Rules Of Criminal Procedure Or To Take Other Appropriate Action To Protect The Petitioner's Constitutional Rights By Applying The Decided Case Law Of The Court of Appeals,Other Courts Of Appeals And This Court, Even Though Placed On Notice Of Apparent, Irreconcilable Conflicts Of Interest, Prior To Petitioner's Criminal Trial, Petitioner's Conviction Must Be Reversed.

It will not do for the Trial Judge, as occurred in Petitioner's case, to permit the simultaneous representation of the Petitioner, in his criminal trial proceedings and the government's prosecutor, the Chief of the Criminal Division, the First Assistant U.S. Attorney, who is participating in, supervising and directing the prosecution of the Petitioner, in a civil controversy involving $587,896.00, when the trial judge is given notice prior to trial of the apparent irreconcilable conflicts but who, nevertheless, fails to take affirmative

action by the conducting of a Rule 44 (c), (supra), (Garcia) Hearing or to take other affirmative actions to protect Petitioner's constitutional rights. **On this issue the decision of the Court of Appeals flies in the face of landmark decisions of the Supreme Court, the established precedent of its own Circuit and of other appellate courts.** See Wheat v. U.S., (supra); Hoffman v. Leeke, (supra); Akinseye, (supra); U. S. v. Ramsey, (supra); Holloway v. Arkansas, (supra); U.S. v. Rosenwald, 898 F.2d 585 (7th Cir. 1990); Zuck v. Alabama, 588 F.2d 43 (5th Cir. 1979); cert. denied 444 U.S. 853, 100 S. Ct. 63, 62 L. Ed. 2d 42 (1979); Wood v. Georgia, (supra); U. S. v. Tatum, (supra).

That the Court was given notice prior to trial of the apparant conflicts and took no afffirmative action cannot be disputed. Counsel Ciccarello's Motion To Withdraw as Petitioner's counsel, filed May 8, 1987, constituted the first notice to the Court of Petitioner's allegations of conflicts of interest:

FIRST NOTICE

> "That on the 7th day of May,1987, the Defendant, Grover C. Jones, Jr., did appear in the offices of Lewis, Ciccarello & Friedburg and during a heated conversation, with counsel raised questions surrounding alleged conflicts of interest existing between the representation by counsel of the Defendant and other clients of counsel which the Defendant alleged were significant and created an irreconcilable conflict of interest reposing in counsel." (emphasis supplied) App. at 78-79.

The said notice to the Court, standing alone, was sufficient to trigger the duty of the Trial Judge to sua sponte conduct an inquiry as provided by Rule 44 (c), (App. at 19), of the Federal Rules of Criminal Procedure, the established case law of the Fourth Circuit, other Courts of Appeal, and the Supreme Court. See Hoffman v. Leeke, (supra); U. S. v. Ramsey, (supra); U.S. v.Akinseye,(supra); Holloway v. Arkansas, (supra); Wood v. Georgia, (supra); Cuyler v. Sullivan, (supra); Wheat v. U.S., (supra); Federal Rule 44 (c), (supra).

> **[w]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's**

chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Wheat,(supra),U.S. 161-162;Hoffman v. Leeke,(supra);(emphasis supplied)

SECOND NOTICE

An ex parte hearing was conducted by the Court on the 12th day of May, 1987, on Ciccarello and Martin's Motion to Withdraw. App. at 82. The conflicts of interest reposed in Petitioner's attorney and the Chief of the Criminal Division, First Assistant U. S. Attorney Wayne Rich, became apparent on the record at the said May 12, 1987, hearing when Attorney Arthur T. Ciccarello acknowledged to the Court for the first time that he represented the Chief of the Criminal Division, First Assistant U.S. Attorney Wayne Rich, in a civil action stating:

> **"[w]e represent and have represented in a civil action Mr. Wayne Rich...."** (emphasis supplied) App. at 85.

The point could not have been brought home to the Court more vividly than as above and the

circumstances in terms of their obviousness to the Court are not at all dissimilar to those in the recent Fourth Circuit case decided in Hoffman v. Leeke, (supra), which stated:

> "At that time when the particular conflict came into sharp focus, further inquiry should have been made." at 289.

The fact of the conflict in Petitioner Jones's case was further impressed upon the Court with the explication on the record of two requests by Petitioner's Counsel to permit the filing of a written memorandum to be made part of the record.

FIRST REQUEST

ATTORNEY CICCARELLO: What we thought we might do, if the Court would agree with us, is to submit to the Court a written memorandum executed by both Counsel and by Mr. Jones that resolves any problems that we may have in writing so that the Court would have it of record in this proceeding. App. at 84-85.

SECOND REQUEST

ATTORNEY CICCARELLO: But I thought perhaps something ought to be on the record in the form of a

> (sic) of a written memo so that there wouldn't be any problem later on about any raising of any conflict in this particular issue. App. at 86.

> If a defendant or his attorney gives the trial court notice of the alleged conflict and the trial court fails to inquire into the conflict,a reviewing court will presume prejudice. See Holloway v. Arkansas,(supra),435 U.S. at 488 and 495.

> Without such an inquiry a finding of knowing and intelligent waiver will seldom, if ever, be sustained.See U.S. v. Lawriw, 568 F.2d 98 (8th Cir.1977),cited in Rule 44(c) Federal Rules of Criminal Procedure.

A clear opportunity, as above evidenced, was afforded for a Rule 44(c) (Garcia) Hearing, (supra), and/or Inquiry as in Akinseye, (supra), but the request completely eluded the Trial Judge.

THE COURT: **I'm not quite sure I understand what's going to be in this memorandum.I don't mean the details of it but generally.** App. at 85.

C. The Trial Judge In Her Findings, Summarily Affirmed by the Appellate Court, Applied An Erroneous Standard To The Facts In Petitioner's Case.

In a mind-boggling decision of September 24, 1991, App. at 5, the District Trial Judge,

in affirming the Report-Recommendation of the U.S. Magistrate Judge, misplaced and misinterpreted the issues and applicable principles of the law in these, rejecting the established law of the Fourth Circuit Court of Appeals, other Courts of Appeals, and the Supreme Court, regarding the duty of the Trial Judge to sua sponte conduct an inquiry when placed on notice prior to trial of apparent conflicting interests applying an improper standard to the conflicts of interest which permeated Petitioner's criminal proceedings, stating:

> "In order for a criminal defendant to demonstrate that counsel's performance was adversely affected by a conflict of interest,he must show (1)the attorney actively represented conflicting interests and (2) **the record demonstrates specific instances where defense counsel acted or refrained from acting due to the conflicting interests.**" (citing Cuyler,446,U.S. 335,1980) (p. 4 and 5 of said Order.) App. at 11.

Further, **"The Court finds that the movant has failed to make such a showing."** App. at 11.

The above ruling by the Court flies in the face of landmark decisions of this Court.

An appropriate consideration of two important cases, decided by this Honorable Court, Cuyler v. Sullivan, (supra), and Holloway, (supra), provides the key to when reversal is appropriate after a finding of ineffective assistance due to a conflict of interest. **This Honorable Court has elaborated upon the subject, finding an important distinction between conflicts timely raised prior to or at trial (Holloway) and conflicts not raised until after the trial (Cuyler).** The facts extrapolated from Cuyler upon which Trial Judge, Hallanan, erroneously relied in determining Petitioner Jones's issue was counsel's--rather than the trial court's--ineffectiveness, the Cuyler Court concluded that because defense counsel in that case had not raised the conflict of interest issue prior to or at trial dictated the application of a different constitutional test than that used in the Holloway case where counsel had timely raised the issue, placing the trial court on

notice.

> In order to establish a violation of the Sixth Amendment a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler, (supra), 446 U.S. 348; See also (Burger v. Kemp, (supra); Strickland v. Washington, (supra)

The above Cuyler standard, while appropriate for the disposition of the first conflict which developed herein, June, 1986, (supra), is inappropriate in regard to the second conflict which developed herein at the May 12, 1987, ex parte hearing since with regard to the second conflict which was presented in Petitioner's case, the Trial Judge was placed on notice of the apparent conflicts and thus, Holloway, (supra) is controlling.

In Holloway, (supra), the trial court's failure to adequately respond to counsel's motion for separate counsel was deemed automatically to require reversal of the defendant's conviction (i.e., without the necessity of demonstrating, as in Cuyler, that

"an actual conflict of interest" rather than the "possibility" of a conflict existed) which "adversely affected his lawyer's performance." 435 U.S. 489.) See also Wood v. Georgia, (supra), wherein the Supreme Court concluded that unlike Cuyler, "the possibility of a conflict of interest was sufficiently apparent at the time of the [probation] revocation hearing to impose upon the court a duty to inquire further." at 272. As Judge Sprouse has expressed in the Fourth Circuit Case, U.S. v. Ramsey, (supra), referring to Wood v. Georgia, (supra), it was not the mere "possibility" of any conflict but the "possibility of a particular conflict" which triggered the duty of the court to sua sponte inquire. at 1018.

The Petitioner's case falls within Holloway, (supra), (supported by Wood v. Georgia, (supra),) which requires reversal because the Court was placed on notice of the apparent conflict and failed to conduct an

inquiry. App. at 85.

And even in Cuyler, if the trial court knows or reasonably should know that a particular conflict exists, the court must (sua sponte) initiate an inquiry. Cuyler, 64 L. Ed. 2d at 346.

> Where trial counsel timely identifies the risk of a conflict of interest, the trial judge must either appoint separate counsel or...take adequate steps to ascertain whether the risk of a conflict..[i]s too remote to warrant separate counsel. Holloway, 435 U.S.485-488,(supra).See also U.S. v. Ramsey, (supra);Hoffman v.Leeke,(supra);Akinseye,(supra). It is reversible error for a trial judge not to inquire into a possible conflict of interest if the court knew or should have known that a potential conflict of interest existed. U.S. v. Allen,831 F.2d 1487 (9th Cir. 1987) citing Zuck,(supra);U.S.v. Ramsey, (supra); U. S. v. Tatum, (supra); U.S.v.Mazzafferio,865 F. 2d 450,(1984); Holloway,(supra); Akinseye,(supra); U.S. v. Atkinson, 565 F. 2d 1283, on Court's duty to hold sua sponte inquiry; U.S.v. Cronic,466 U.S.648;U.S.v. White,706 F.2d 506,(5th Cir.1983) Wood v. Georgia,(supra); U.S. v. Ramsey, (supra); U.S. v. Ziegenhagen, (supra)

The option in Holloway, (supra), regarding

inquiry is not satisfied by perfunctory inquiry", a "searching review" is required. See Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S. Ct. 316, 323-324, 92 L. Ed. 309, (1948) and "where the trial court fails", "reversal of the defendant's conviction is automatic" even in the absence of a showing of prejudice and "even if the defendant was clearly guilty."(Holloway, (supra)

Unequivocally, on May 8, 1987, and again on May 12, 1987, approximately one month from the commencement of Petitioner's criminal trial, Trial Judge, Hallanan, was placed on notice of apparent, irreconcilable conflicts of interests reposing in Petitioner's counsel and FAUSA Rich, but, nevertheless, failed to sua sponte conduct a hearing in order to determine whether to require separate counsel for Petitioner or that the risk of the obvious conflicts was too remote to warrant separate counsel for Petitioner or to take other appropriate measures to protect the Petitioner's rights.

D. The Petitioner Did Not Waive His Constitutional Right To Conflict Free Counsel

The Appellate Court's decision affirming the findings of the Trial Judge in her Order of September 24, 1991, that the Petitioner on May 12th 1987,at an ex parte hearing on a motion of Petitioner's counsel to withdraw, voluntarily, knowingly and intelligently waived his right to conflict free representation, App. at 12, is contrary to its own established precedent on the issue of waiver, of other Courts of Appeals, of Rule 44 (c) of the Federal Rules and of the Supreme Court. The record offers no support for such a confounding conclusion. The Petitioner, however, will present the ludicrousness of the Trial Judge's untenable position.

The following colloquy relied upon by the Trial Judge and the Court of Appeals consisting of one simple general question hardly suffices to pass the Constitutional muster, the law of the Fourth Circuit, other Courts of Appeals and the Supreme Court as an adequate inquiry and/or

obtainment from Petitioner of a waiver of the most pervasive of all constitutional rights..the right to counsel. (See also Rule 44 (c))

THE COURT: **"All right, Mr. Jones, I take it your presence here and having heard the statement of your counsel that you concur in his remarks; is that correct?"** App. at 88.

Such an outlandish conclusion based on the above would ignore the decisions reached in this Court of Holloway, (supra); Von Moltke v. Gillies, (supra); Johnson v. Zerbst, 304 U. S. 458, 464-65 (1938), Brady v. U.S., 397 U. S. 747 (1970); Wheat v. U.S., (supra) and the Fourth Circuit cases of Hoffman v. Leeke, (supra); Akinseye v. U.S., (supra); U.S. v. Ramsey, (supra); U. S. v. Tatum, (supra); and a complete contradiction to the very substance of Rule 44(c) and the Garcia principles set forth therein.

And see Zuck v. Alabama, (supra). In Zuck, the state contended Zuck waived his right to effective assistance of counsel since he proceeded to trial knowing of the conflict of

interest. The Court did not agree:

> "Fact that defendant did not seek change of counsel after witness allegedly informed him that his attorneys were also representing the prosecutor did not establish a waiver of conflict free counsel."at 440.

> [W]hether the risk of a conflict [is] too remote to warrant separate counsel...[is] not satisfied by perfunctory inquiry ,a searching inquiry is required. Holloway, (supra),(emphasis supplied)

> **"The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right, does not automatically end the judge's responsibility."** Also quoted by 4th Circuit Judge K.K.Hall,in Hoffman v. Leeke, (supra).[3]

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[3] It is interesting that Judge Hall applied Wheat, (supra), and the above principles in the case of Hoffman v. Leeke, (supra), but not to Petitioner's case.

The Utah Supreme Court has added that "the burden is upon the attorney to show that he had made full disclosure and had obtained his client's consent." In re Hansen, 586 P.2d 413,415, (Utah, 1978)

The ABA Standards Relating to the Function of the Trial Judge in Determining the Issue of Waiver Have Been Incorporated in the Federal Rules of Criminal Procedure, Rule 44 (c). (See Federal Rules of Criminal Procedure.)

> "It must be emphasized that a waiver of the right to separate representation should not be accepted by the court unless the defendants have each been informed of the probable hazards; and the voluntary character of their waiver is apparent".

> "Every reasonable presumption will be indulged against waiver of fundamental constitutional rights by one charged with a crime." Glasser, (supra). (The ABA Standards Relating to the Function of the Trial Judge in Determining the Issue of Waiver Have Been Incorporated In the Federal Rules of Criminal Procedure, Rule 44(c).)

The American Bar Association Standards for the Administration of Criminal Justice state

that no waiver of counsel should be accepted unless it is in writing and of record. ABA Standards Providing Defense Services Section 5-7-3.

United States v. Akinseye, (supra) and Hoffman v. Leeke, (supra), establish the test in the Fourth Circuit which the trial judge must apply before deciding whether a fundamental right, such as the right of effective assistance of counsel can be waived.

In Akinseye it was held that the Court must conduct sua sponte inquiry into its existence (at 744) and pursuant to said Federal Rules of Criminal Procedure 44(c) shall obtain a response from the defendant indicating:

> **"That he has been advised of his right to effective representation, that he understands the details of his conflict of interest and the potential perils of such a conflict,that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protection."** Akinseye,(supra),at 745. (emphasis supplied) "To be valid, a waiver must not only be voluntary,it must be done knowingly and intelligently." Brady v. U.S., (supra)

The Trial Judge's findings that Petitioner, knowingly, intelligently and voluntarily executed a waiver of such a basic constitutional right as to be represented by conflict free counsel, are not supported by the record. Nor does the record support an inference that neither the Court nor Petitioner's counsel even perceived a conflict of interest.

ATTORNEY CICCARELLO: Your Honor may know I've represented prosecutors, judges and different people which I don't feel has any bearing upon my representation of a client in a criminal case. App. at 86.

ATTORNEY CICCARELLO: **I have explained to him (Mr. Jones)our representation of Mr. Rich and the limitation of that representation and I think he is satisfied that that representation has no bearing upon our representation of him in this particular criminal action.** App. at 85-86.

But see Rosenwald v. U.S., (supra), at 587:

> "The fact that the simultaneous representation is on a civil matter makes no difference in the conflict of interest inquiry." See also Castillo v. Estelle, 504 F.2d 1243, 1245, (5th Cir.1974).

The Petitioner's counsel failed in all respects to satisfy the elements of consent and disclosure contained in DR 5-105(c) of the ABA Code which provides:

> **"In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires."** (emphasis supplied)

E. Even If The Court Had Conducted An Inquiry, It Would Not Have Been Proper For A Waiver To Have Been Accepted In Petitioner Jones's Case

In Wheat v. U.S., (supra), the majority explicitly found that otherwise valid waivers of conflicts of interest do not always remedy all of the "problems created by...multiple representation."

As Chief Justice Rehnquist reasoned for the Court, "no such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice [since] federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical

standards of the profession and that legal proceedings appear fair to all who observe them." (emphasis supplied) As Chief Justice Rehnquist explained, "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation. See Hoffman v. Leeke, (supra). In Hoffman v. Leeke, (supra), Judge Hall, in reversing, stated,

> "[w]e believe that a member of the of the public would be shocked to observe a criminal trial in which the same attorney represented both the defendant and the state's star witness". at 288.

but found nothing wrong in Petitioner Jones's case wherein Jones's attorneys also represented the federal prosecutor who was simultaneously prosecuting Jones.

Accordingly, the Wheat Court ruled that although trial courts "must recognize a presumption in favor of [defendant's] counsel of choice...that presumption may be overcome not only by a demonstration of actual conflict but

by showing of a serious potential for conflict." (emphasis supplied) And in Hoffman v. Leeke, (supra), Judge Hall admonished the Court for not prohibiting the multiple representation stating:

> "[t]he Court should have exercised its power to prohibit the multiple representation even if Hoffman had proffered a valid waiver". at 290.

Finally, it was made abundantly clear in Counsels' Motion to Withdraw that anything Defendant, Petitioner herein, said at the ex parte hearing of May 12, 1986, could not be used in any way against Petitioner. App. at 81.

F. The Government Prosecutor, Rich, And Petitioner's Counsel, Ciccarello And Martin Violated Numerous ABA Code Provisions On Simultaneous Representation

See ABA Code's three basic provisions on point: DR 5-101 (A) and DR 5-105 (A) and (B), App at 21.; The Model Rules counterpart to the three ABA Code provisions Model, Rule 1.7,(a) (1), (2) and (b) (1) (2), which are the same as adopted by the Supreme Court of Appeals of the State of West Virginia, App. at 22. ; The ATLA Code On Simultaneous Representation, Rule 2.1,

ATLA Rule 2.4, App. at 22.; ABA Defense Function Standard 4-3.5, comprehensive sections, Standard 4-3.5(a) and (b), App. at 21-22.

G. The Chief of the Criminal Division, FAUSA Rich, In Failing To Disclose His Irreconcilable Conflicts Violated A Federal Criminal Statute, The ABA Code of Professional Responsibility, (Adopted By The Supreme Court Of Appeals Of West Virginia), And The ABA Model Code Applied By The United States Department Of Justice.

Indisputably, in the within case, Prosecutor Rich continued to embrace Petitioner's counsel as his representatives and business associates after he learned of their employment by Petitioner on or near June 1, 1986. In fact, it was after said employment relationship that the Federal Prosecutor caused Petitioner's Counsel, Ciccarello, to file the within described civil action on August 20, 1986. App. at 69. In the above, Prosecutor Rich violated criminal statute Title 18 U.S.C. Section §208(a), App. at 19; ABA Standards for Criminal Justice Section 3-1.2, App. at 22, and ABA 3-2.10, App. at 22.

In the above, FAUSA Rich also violated the ABA Model Code of Professional Responsibility, (adopted by the Supreme Court of Appeals of West Virginia), adopted by the U.S. Department of Justice 28 CFR 45.735-1(b), (1986), which contains numerous provisions relating to conflicts of interest, 45.735-4, App. at 20, DISQUALIFICATION ARISING FROM PERSONAL OR POLITICAL RELATIONSHIP AND, 45.735-5, App. at 20, DISQUALIFICATION ARISING FROM PRIVATE FINANCIAL MATTERS.

CONCLUSION

At two separate periods during Petitioner's criminal proceedings actual conflicts of interest became apparent either of which considered independent of the other sets forth a constitutional violation of Petitioner's Sixth Amendment right to counsel and his Fifth Amendment right to due process, rendering Petitioner's conviction unconstitutional.

The <u>first period</u> was during the first several days of Counsel Ciccarello's and

Martin's representation of Petitioner, June, 1986, when said Counsel entered into the plea negotiations on Petitioner's behalf with the federal prosecutor, whom Petitioner's counsel were simultaneously representing. It should end right here... and Petitioner's request for the writ should be granted but the conflicts broadened during a second period of Petitioner's proceedings to-wit, May, 1987, just days prior to the commencement of Petitioner's trial, exacerbating the dilemma.

The record before this Court fully reveals that the actual conflicts and intolerable inconsistent interests of Petitioner's Counsel, and the Chief of the Criminal Division, First Assistant U.S. Attorney Wayne Rich and his wife, Regina, whom Attorney Arthur T. Ciccarello and Robert Martin were simultaneously representing, were brought home to the court prior to Petitioner's trial, to-wit on May 7, 1986, when Petitioner's counsel filed their Motion to Withdraw and were explicated on the record at

the May 12th, 1986, hearing held on Counsels' said Motion to Withdraw. The Court, however, made no discernible effort to ascertain Jones's attitude as to waiver of conflict free representation or make inquiry into the nature of the conflicts which became apparent on the record. The hearing had on May 12, 1986 was an ex parte hearing, held in the absence of the government and the subject of same embraced only Counsel Ciccarello's and Martin's Motion to Withdraw...nothing else.[4] That the Court did not construe the colloquy developed at the May 12, 1986, ex parte hearing, as a waiver of Petitioner's Sixth Amendment Constitutional right to counsel is evidenced by the fact that

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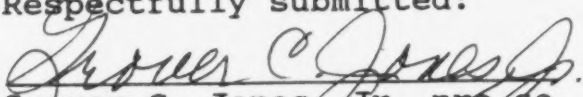
[4] It is noted that the in camera hearing (ex parte hearing) was requested (pursuant to said Counsels' Motion to Withdraw and granted by the Court) "[i]n order to protect Defendant's rights" and in order that no "statements or testimony elicited or given before the Court could be used in any way against this defendant." App. at 81. And further, the transcripts of same were sealed by the Court. App. at 81.

no order was entered so holding until September 24, 1991, more than five (5) years subsequent to said hearing. App. at 11-12. Under these circumstances, to hold that Jones waived his sacred Constitutional rights to conflict free counsel is to do violence to reality and to condone a dangerous laxity on the part of the Trial Court in the discharge of its duty to preserve the fundamental rights of an accused.

The facts and the law herein cry out for justice to prevail and for the release of Petitioner from the unlawful constraints of political bondage in which he has been held for more than six (6) years and from the unconscionable conditions and restraints upon his liberty following Petitioner's release of several years of parole supervision to be followed by five (5) years of probation, five (5) years of community service and other constraints upon Petitioner's liberty, placed there by the system which did not work...which failed to afford unto Petitioner a fundamentally

fair trial. The Petitioner's request for a Writ of Certiorari should forthwith be granted.

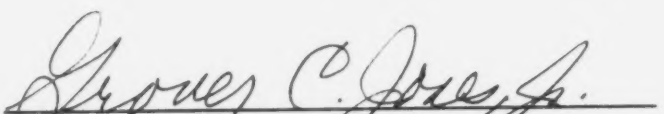
Respectfully submitted:



Grover C. Jones, Jr. pro se
Of Counsel for Grover C. Jones,Jr.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 19.3 and 28 of the Supreme Court Rules, that I have on this 16th day of June, 1993, mailed, with first-class postage pre-paid, three copies of the foregoing Petition for a Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D. C. 20530 and, under separate cover, three copies to Charles Miller, Assistant U. S. Attorney, Office of the United States Attorney, 500 Quarrier Street, Post Office Box 3234, Charleston, West Virginia 25332, who constitute all parties that are required to be served.



Grover C. Jones, Jr. pro se
Of Counsel for Grover C.Jones, Jr.

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

United States Of America,
Plaintiff-Appellee,

v.

Grover C. Jones, Jr.
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia,
at Bluefield.
Elizabeth V. Hallanan, District Judge.
(CR-85-80-1, CA-90-83-1)

Submitted: August 27, 1992

Decided: October 15, 1992

Before WIDENER, HALL, and PHILLIPS,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Grover C. Jones, Jr., Appellant Pro Se. Charles T. Miller, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia; Richard Stanley Glaser, Jr., Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Grover C. Jones, Jr., appeals from the district court's orders refusing relief under 28 U.S.C. § 2255 (1988), denying his motion for reconsideration under Fed. R. Civ. P. 59(e), and denying his "Motion to Strike." Jones seeks expedited review. Our review of the record and the district court's opinion accepting the recommendation of the magistrate judge discloses that this appeal is without merit.Accordingly,we affirm on the reasoning of the district court. *United States v. Jones,* Nos. CR-85-80-1, CA-90-83-1 (S.D.W. Va. Sept. 24, 1991; Feb.12, 1992;Mar.20,1992).We deny Jones's motions for oral argument,to appoint counsel,for hearing in banc,and "That Court Note Appellant's Concern For Attempts to Influence Proceedings." We grant Jones's motion to correct and supplement his informal brief.We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-6426

United States Of America,

Plaintiff-Appellee,

versus

Grover C. Jones, Jr.

Defendant-Appellant.

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is ADJUDGED and ORDERED that rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it is hereby is, denied.

It is FURTHER ADJUDGED and ORDERED that so

far as the papers may be considered a request for oral argument, the said request shall be, and it hereby is, denied.

So far as the papers may be considered a motion for a change of venue, it is ADJUDGED and ORDERED that the said motion shall be, and it hereby is, denied.

It is FURTHER ADJUDGED and ORDERED that the motion of Jones that we stay issuance of the mandate in this case pending application for writ of certiorari to the Supreme Court shall be, and it hereby is, denied.

With the concurrences of Judge Phillips and Judge Hall.

/s/ H. E.Widener, Jr.

For the Court

Filed, February 16, 1993
U. S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

UNITED STATES OF AMERICA

Criminal No. 1:85-00080

GROVER C. JONES, JR.

ORDER

This matter is before the Court for de novo review of the May 15, 1991 Report-Recommendation of the Honorable Jerry D. Hogg, United States Magistrate Judge, concerning the present motion filed for summary judgment and entry of default judgment against the United States. Having carefully reviewed the objections and papers presented as well as the Report-Recommendation of the Magistrate Judge, the Court is prepared to issue its rulings herein.

On June 25, 1985, a grand jury convened in the Bluefield Division of this Court and returned a five-count indictment against Grover C. Jones, Jr. charging him with violations of 18 U.S.C. § 1342 in connection with a mail fraud scheme to burn a building in Matoaka, West

Virginia to collect fire insurance proceeds. On June 18, 1987, a jury of his peers found him guilty on all five counts of the indictment. Subsequently the Court sentenced Mr. Jones on July 30, 1987 to five years of imprisonment on each of Counts One, Two and Three of the indictment to run consecutively for an imprisonment term of 15 years. Additionally, the Court sentenced Mr. Jones to five years of imprisonment on Counts Four and Five of the indictment. The Court ordered the imprisonment terms on the latter two counts to run concurrently with each other and suspended execution of sentence on said counts. The Court also fined Mr. Jones $5,000.00, the maximum amount, and placed him on five years of probation. The Defendant below timely appealed his sentence which the United States Court of Appeals for the Fourth Circuit upheld in a published opinion entered on October 17, 1989.[5]

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[5] See United States v. Jones, 887 F.d 492 (4th Cir. 1989).

In 1988 Mr. Jones filed a previous motion for habeas corpus relief pursuant to 28 U.S.C. § 2255. Upon his own motion to dismiss, the Court granted the same and dismissed the habeas corpus motion without prejudice. Mr. Jones filed another motion for habeas corpus relief on August 13, 1990 which is now before the Court. The movant seeks relief from his sentence and imprisonment on the grounds of conflict of interest, prosecutorial misconduct, ineffective assistance of counsel and moves for the disqualification of this district judge. In his Report-Recommendation, Magistrate Judge Hogg recommended that the Court deny the motion of Grover C. Jones, Jr., to vacate his sentence pursuant to 28 U.S.C. § 2255 as well as his motions for summary judgment and default judgment. For reasons stated below, the Court affirms the Report-Recommendation of Magistrate Judge Hogg.

I.

Mr. Jones attempts to include by reference the claims of his original § 2255 motion, filed in 1988, with the claims set forth in his present § 2255 motion. In his Report-Recommendation, Magistrate Judge Hogg determined that the original motion and its claims cannot be included by reference in the present motion, citing Rule 2 of the Rules Governing Proceedings in the United States District Court Under Section 2255 of Title 28, United States Code. We concur. Rule 2 expressly provides in pertinent part that a § 2255 motion "shall specify all the grounds which are available to the movant and of which he has or, by the exercise of reasonable diligence, should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified: (emphasis added). The Court believes said rule to be abundantly clear. Rule 2 makes it incumbent upon any movant for habeas corpus relief to submit any and all possible grounds of

relief for consideration by the Court. Mr. Jones failed to meet this affirmative burden. Incorporating prior claims by reference does not satisfy this burden. Moreover, as a matter of procedure, the Court is bewildered by the movant's attempt to resurrect claims that have been dismissed without prejudice without renewing those claims by a formal motion. Accordingly, the Court will only consider and evaluate those matters raised by Mr. Jones in his present § 2255 motion.

II.

Federal courts grant relief under 28 U.S.C. § 2255 where a sentence imposed violates an individual's rights under the United States Constitution or the laws of the United States. Relief may also be granted if it is determined that a court was without proper jurisdiction to impose the sentence, if the sentence was in excess of the maximum imposed by law, or is otherwise subject to collateral attack. Collateral attacks under 28 U.S.C. § 2255 are

limited to claims of constitutional magnitude or to errors which inherently result in an utter miscarriage of justice. United States v. Addonizio, 442 U.S. 178, 184-186 (1979); Hall v. United States, 368 U.S. 424, 428 (1982). Moving for relief under 28 U.S.C. § 2255 does not give a defendant an opportunity to try over again his case in which he has been found guilty. Taylor v. United States, 177 F.2d 194, 195 (4th Cir. 1949).

Mr. Jones asserts that his Sixth Amendment right to effective assistance of counsel was violated as a result of a conflict of interest arising from simultaneous representation of the movant and First Assistant United States Attorney Wayne A. Rich, Jr., the prosecuting attorney, by movant's counsel Arthur T. Ciccarello, Esquire. Specifically, Mr. Jones charges that Mr. Ciccarello breached his duty of loyalty to him through representing Mr. Rich and his wife in a civil matter. It is undisputed that a criminal defendant is entitled to counsel

whose individual loyalties lie with his client. United States v. Barnes, 909 F.2d 1059 (7th Cir. 1990). Accordingly, a criminal defendant may legitimately assert a claim of ineffective assistance of counsel where his attorney was burdened by a conflict of interest. Cuyler v. Sullivan, 446 U.S. 335 (1980). In order for a criminal defendant to demonstrate that counsel's performance was adversely affected by a conflict of interest, he must show that (1) the attorney actively represented conflicting interests and (2) the record demonstrates specific instances where defense counsel acted or refrained from acting due to the conflicting interests. Id.

The Court finds that the movant has failed to make such a showing. Moreover, the record indicates that Mr. Jones waived his right to representation free of conflict. On May 8, 1987, Mr. Ciccarello, counsel for Mr. Jones, filed a motion to withdraw as counsel given Mr. Jones' contention of a conflict of interest. The Court conducted an ex parte hearing on May

12, 1987. Mr. Ciccarello and Mr. Jones both appeared at the hearing. The transcript of the hearing reveals that Mr. Ciccarello and Mr. Jones amicably resolved the conflict of interest issue among themselves. Further, Mr. Jones stated on the record that he understood the position of Mr. Ciccarello regarding his representation of Mr. Rich in his civil matter and that "we're on good terms about it and I have no problem with it."[6] We find that this statement viewed in light of the May 12 hearing constitutes a knowing, intelligent and voluntary waiver of his right to conflict-free representation. Holloway v. Arkansas, 435 U.S. 475, 483 n. 5 (1978); United States v. Akinseye, 802 F.2d 740 (4th Cir. 1986). Thus, movant's allegation of conflict of interest is without merit.

In a similar vein, Mr. Jones asserts a

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[6] Transcript of May 12, 1987 hearing, page 6, lines 19-20.

violation of his constitutional right due to prosecutorial misconduct by Mr. Rich. The basis of this charge lies in the conflict of interest allegation discussed above. Mr. Jones contends that Mr. Rich violated the law due to the conflict of interest situation and adversely influenced Mr. Ciccarello in his representation. The Court finds this charge void of substance and lacking merit. It is the belief of the Court that Mr. Rich did not engage in prosecutorial misconduct as alleged.

III.

In his claim for ineffective assistance of counsel, the movant argues that Mr. Ciccarello deceived him in failing to interview and call all of the witnesses named by Mr. Jones on the witness list. In his motion, Mr. Jones places particular emphasis on his counsel's failure to call Mr. Rich as witness at trial. Our review of the record does not support this Sixth Amendment claim. When a criminal defendant complains of the ineffectiveness of counsel's

assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-8 (1984). In a claim such as this, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. There is a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id.

Mr. Jones has failed to meet his burden under Strickland. His counsel's decision not to interview and call certain witnesses at trial is clearly a matter of trial strategy and, we believe, objectively reasonable. Consequently, the Court finds Mr. Ciccarello[s representation of the movant "effective" within the meaning of the Sixth Amendment.

IV.

Mr. Jones has moved to disqualify this district judge from presiding over this matter. As the Magistrate Judge determined, there is nothing in the record to support this motion. The Court notes that Mr. Jones filed a petition for a writ of mandamus with the United States Court of Appeals for the Fourth Circuit n October 1, 1990 seeking an order to disqualify United States Circuit Judge K. K. Hall and this district judge. The Fourth Circuit denied the mandamus petition without a hearing on November 2, 1990. [7]

Finally, Mr. Jones moves for summary judgment and default judgment against the United States. The motions, in short, repeat the arguments made by the movant on conflict of interest and prosecutorial misconduct. Having already determined that Mr. Jones knowingly, intelligently and voluntarily waived his right

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[7] In Re: Grover Jones, Jr., No. 90-8038 (unpublished opinion).

to conflict-free representation and that there was no prosecutorial misconduct on the part of Mr. Rich, said motions are hereby ORDERED DENIED.

Overall, the Court finds the individual claims of Mr. Jones for habeas corpus relief to be without merit based on the record in this matter. Therefore, no hearing is required to adjudicate the claims discussed herein. Fontaine v. United States, 411 U.S. 213 (1973).

For reasons heretofore stated, the Court affirms the Report-Recommendation of the Magistrate Judge and hereby ORDERS DISMISSED the motion of Grover C. Jones, Jr. to vacate his sentence pursuant to 28 U.S.C. § 2255.

The Clerk is directed to remove this matter from the docket of the Court and send certified copies of this Order to Magistrate Judge Hogg, Grover C. Jones, Jr., and Acting United States Attorney Charles T. Miller.

IT IS SO ORDERED THIS 24TH DAY OF SEPTEMBER, 1991.

ENTER:

_____

ELIZABETH V. HALLANAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 23, 1993

No. 92-6426
CR-85-80-1
CA-90-83-1

US v. Jones

M A N D A T E

The judgment of this Court dated 10/15/92 takes effect today.

BERT M. MONTAGUE
CLERK

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18 U.S.C. §208(a):

> Whoever being an officer of the executive branch of the United States government participates personally and substantially as a government officer through decision,approval, disapproval, recommendation,the rendering of advice, or investigation,in a judicial proceeding in which he,his spouse, or any person with whom he is negotiating has a financial interest-shall be fined not more than $10,000 or imprisonment of not more than two years, or both.

RULE 44 (C) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

> Whenever two or more defendants...are represented by the same retained or assigned counsel.... the court shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise,the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

28 C.F.R. §45.735-4

(a) [n]o employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that in the subject of the investigation or prosecution.

28 C.F.R. §45-735-5

No employee shall participate personally and substantially as a government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other proceed ing,application,request for a ruling or other determination, contract, claim, controversy, charge, accusation,arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner,organization in which he is serving as officer,director,trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest.

LOCAL RULE (h) OF THE U.S. DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA

(h) The Code of Professional Responsibility of the American Bar Association, the Model Rules of Disciplinary Enforcement as adopted and promulgated by the Supreme Court of Appeals of West Virginia are recognized as em-

West Virginia are recognized as embodying and providing the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this federal court.

ABA CODE OF PROFESSIONAL RESPONSIBILITY

DR 5-101(A),(e)xcept with the consent of his client after full disclosure a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be reasonably or may be affected by his own financial,business, property, or personal interests.

DR 5-105 (A), A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or if it would be likely to involve him in representing differing interests...

DR 5-105 (B), A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests...

ABA DEFENSE FUNCTION STANDARD

4-3.5(a) Defense counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.

(b) Defense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of counsel to represent him or her or counsel's continuing representation.

ABA STANDARDS FOR CRIMINAL JUSTICE

§3-1.2
A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties.

§3-2.10
When the possibility of a conflict of interest arises,the prosecutor should recuse himself and make appropriate arrangements for the handling of the particular matter by other counsel.

MODEL RULES ON SIMULTANEOUS REPRESENTATION

The Model Rules counterpart to the three ABA Code provisions is a single rule, Model Rule 1.7,(a)(1),(2) and (b)(1)(2). The underlying thrust of both sets of provisions is the same as ABA Code Provision DR 5-101-A, DR 5-105-A, 105-B.

THE ATLA CODE ON SIMULTANEOUS REPRESENTATION

The basic thrust of the ATLA Code is to much the same effect as ABA Code Provision DR-101(A), DR-105(A), DR-105-(B).

Rule 2.1 [i]n a matter entrusted to a lawyer by a client,the lawyer shall give undivided fidelity to the client's interests.
Rule 2.4 [w]here such undivided fidelity is lacking due to conflicting loyalties, representation is impermissible.

P. O. Box 778
Panacea, Florida 32346
October 28, 1992

_____, Judge
United States Court of Appeals
For the Fourth Circuit
United States Courthouse
Tenth & Main Streets
Richmond, Virginia 23219

In re: U.S. v. Grover C. Jones, Jr.
Appeal No. 92-6462

Dear Judge _____: (This letter was communicated to each member of the Fourth Circuit Court of Appeals.)

I am **appalled** and **outraged** at the recent decision handed down by your fellow member of this circuit, Judge K.K. Hall, regarding my husband's, Grover C. Jones, Jr., conflict of interest case. Of all the circuits in the United States, I was under the impression that this circuit was the most adamant in regard to conflicts of interest. This opinion was based on previous decisions by this court and primarily on Judge Hall's own decision in Hoffman v. Leeke, 903 F.2d 289,290, (4th Cir. 1990) wherein he emphatically states that the trial court has a duty to:

> "[p]rohibit multiple representation where it undermines the integrity of our system of justice." and,
>
> **"[W]hen a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to**

conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant."

In the particular case referred to, U. S. v. Grover C. Jones Jr., the primary thrust was the fact that Grover's own attorneys, Tom Ciccarello and Robert Martin, represented simultaneously the Chief of the Criminal Division, First Assistant United States Attorney, Wayne Rich, who was the one individual who called all the shots regarding Grover's conviction from day one even up into the incarceration. Nowhere in the annals of justice has such as this been condoned and covered up as has been done in the dark and secretive "halls of justice" in West Virginia.

It is not the fact that I am outraged and appalled at the decision as such when I learned that Justice K.K. Hall was on the panel. It is not the fact that I expected any other decision when I learned that Justice K. K. Hall was on the panel. It is the fact that one Justice has been appointed to decide the fate of this man's life over and over again in all of his appeals and continuously writes "Denied, denied, denied...."

My first question to you is, "Why was Justice Hall permitted to serve on this panel when he has been asked by the Appellant to recuse himself time after time?"

The Honorable James Sprouse personally knows my husband. He has recused himself each time an issue is presented to this court. **Why does Justice Hall not do the same?** My position is that it is a deliberate, contrived, and unethical agreement between the political forces in West Virginia and this particular justice.

Being a part of the political system in

West Virginia, Judge Hall is from the Charleston area wherein FAUSA Wayne Rich, Tom Ciccarello, Robert Martin, the U.S. Attorney, Michael Carey, and other judges and officials play "political football" with each other. This is a known fact. A Washington, D.C. former attorney for Arch Moore, one-time governor of this state, once said, "Politically, there is no other place like West Virginia when it comes to politics and justice. They all play ball together."

Dennis Dohnal, an attorney from Richmond, Virginia, whom you may well know, was my husband's appellate attorney after conviction. He knew the problems of having Judge Hall sit on the panel to decide his first appeal. (See attached letter of June 23, 1989, from Dennis Dohnal to Grover Jones.) However, he did not ask the Judge to recuse himself believing that since the oral argument would be heard in Charleston, South Carolina, no way would this Judge travel all the way down there to hear this case. The night before the oral argument when it was learned that this man would be sitting on the panel, I called Mr. Dohnal and emphatically stressed that he should ask for Judge Hall's recusal. Even though Mr. Dohnal agreed that this was a terrible predicament, he stated that it was "too late." Sure enough, Judge Hall sat on the panel and sure enough the appeal was denied with major constitutional issues not even addressed! Unbelievable? Yes.

I may be a layperson when it comes to the law but I certainly can understand that an attorney cannot and must not represent a client, Grover C. Jones, Jr., while at the same time representing the same person, FAUSA, Wayne Rich, who is prosecuting the client. And what does Justice K.K. Hall write in his "opinion"? THERE WAS NO OPINION GIVEN. He doesn't even take the time to state his position. The reason being, of course, is the fact that he cannot justify his decision because **there is no justification**

for this decision.

My next question is, "Where does one go next to obtain justice, the Supreme Court of the United States?" Very unlikely that they will even look at it, a fact which Judge Hall knows.

I feel extremely frustrated, confused, and yes, heart-broken that our justice system in the United States has come to this point that each and every person within the borders of this country cannot obtain justice because of the political alliances made between those in office who decide the fate of an individual, recklessly, wantonly and maliciously with total disregard of the law. I cannot emphasize enough how unjust Justice Hall's decision was. I cannot emphasize enough that something should be done to over-ride this deplorable decision. Was it because Grover is an inmate incarcerated in a federal institution and presented his appeal pro se? Was it because he had no attorney present to argue this case before the panel? I think not, because the issues were there. I think it was a calculated pre-meditated mutual agreement between the politicians in Charleston, West Virginia and this Justice!

It is a fact that this man's counsel represented the prosecuted and the prosecutor <u>at the very same time</u>, plain and simple. Nowhere, can it be found that this is legal. Nowhere can it be found that any other circuit would permit such an act. Prejudice, if need be, was shown. A plea bargain was made between the accused and the U. S. Attorneys Office which was found by the court to have been consummated even though FAUSA Rich did every thing in his power to have the plea thrown out. Then the two attorneys, Ciccarello and Martin, advised Jones not to accept the plea while at the same time representing FAUSA Rich. Does this not constitute a conflict? I know that it was.

After one year of representation by Mr. Ciccarello, Grover Jones, upon learning for himself, (Mr. Ciccarello had never mentioned the fact), that there were rumors of a conflict in regard to FAUSA Rich, stated to Ciccarello, that "there is a conflict". The conflict was then presented to the judge who listened to Mr.Ciccarello and then did not ask for a Garcia Hearing. After Grover Jones was convicted, I discovered that at the same time Ciccarello and Martin were representing my husband, they also were representing FAUSA Rich in a $587,896.00 civil suit. To this day, neither Attorney Ciccarello, Attorney Robert Martin, nor FAUSA Rich have admitted to the Court nor to Grover Jones that this occurred. Then Justice Hall who insists on commandeering Grover's destiny, literally failing to address the issues of conflicting interests, denies the appeal. Surely, this is not what Justice is about. Surely, the Fourth Circuit Court of Appeals of the United States would not condone this. But Justice Hall did.

My last question is this. "What can the Fourth Circuit Court of Appeals do to help me seek justice?" I would be willing to come to Richmond, Virginia and argue this case myself in an in banc hearing. I would be willing to sit down and explain the situation to any Justice who might listen and look at the evidence presented. I realize that there are certain procedures that must take place and that there are certain rules to follow in regard to an appeal. However, when it comes to the integrity of the United States Justice system and a man's life, there must be room for some allowance to see that justice prevails.

I implore that at least one of you listen to what I have to say, give me some legal latitude to present these issues to you in the presence or without the presence of Justice Hall in order that some semblance of justice can be

had in this very, very wrong decision made by this man. Please do not insist that you are unable to do anything because the decision has already been made. Please do not ignore my request. Please do not write this off as an "idiot savant" who is dissatisfied with her husband's decision. Please give me some type of opportunity to indicate to you the reasons why this was an erroneous decision on the part of Justice Hall. After all, there is still justice somewhere in America, isn't there?

Respectfully,

_____

Patricia W. Jones

Copy: Charles Miller
Assistant U.S. Attorney

LAW OFFICES
BREMNER, BABER & JANUS
SUITE 1500 SEVENTH AND FRANKLIN BUILDING
701 EAST FRANKLIN STREET
P.O. BOX 826
RICHMOND, VIRGINIA 23207
June 23, 1989

LEGAL MAIL - OPEN IN PRESENCE OF INMATE ONLY

Mr. Grover C. Jones
#01114-088
P. O. Box 1000
Petersburg FCI
Petersburg, Virginia 23804

Re: United States v. Grover C. Jones

Dear Grover:

As I know you have heard from Pat, oral argument has been scheduled for Friday, July 28, in Charleston, South Carolina. Hopefully, we will thus be able to avoid a certain jurist. Needless to say, it is about as far away as we can get from Charleston, West Virginia.

The area circuit judges from North and South Carolina are Chapman, Wilkins and Russell -- all of whom would be good, although there is no way of predicting that they would necessarily be on the panel. In addition, there are several local district court judges who are typically assigned to a Court of Appeals panel, especially during summer sessions.

In any event, I must make travel arrangements for the argument such that I will have to ask for an additional amount to cover the cost which, of course, I could not have possibly foreseen to begin with -- as I am sure you understand.

I estimate that the total cost involved would be in the neighborhood of $725.00. I will let you know, of course, the exact amount, but I want to know if there is any problem with it now; if so, I will ask that the matter be re-scheduled for the September term of Court. Obviously, I do not think we should do that for fear that we stand a much greater chance of having Judge Hall on the panel, even though it would be far less expensive.

Thank you.

Sincerely yours,

Dennis W. Dohnal

net
cc: Mrs. Patricia Jones

H.L. Kirkpatrick, III, Esq.
Ashworth & Kirkpatrick
P. O. Drawer AA
Beckley, West Virginia 25801

Re: United States v. Grover C. Jones, Jr.
Criminal No. 1:85-00080 (USDC SDWVa)

Dear Mr. Kirkpatrick:

This will confirm our conversations with regard to your client, Grover C. Jones, Jr. (hereinafter "Mr. Jones"). As a result of these conversations, it is agreed by and between the United States and Mr. Jones as follows:

1. Mr. Jones is charged in a five-count indictment as follows: Counts One through Five charge Mr. Jones with violations of 18 U.S.C., Sections 1341 and 2 (mail fraud).

Mr. Jones agrees to waive his right pursuant to Rule 7 under Rules of Criminal Procedure to be indicted by a grand Jury and agrees to be charged by Information with violations of two following felonies:

a) 18 U.S.C. 4 (misprison of felony) and
b) 18 Appendix 1202 and 2 (aiding and abetting a felon in possession of a shotgun).

3. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 U.S.C. Section 4 is imprisonment for a period of three (3) years and a fine of $500.00. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 Appendix 1202 and II is

_____ _____
GROVER C. JONES, JR. Date Signed
Defendant

_____ _____
H. L. KIRKPATRICK,III Date Signed
Counsel for Defendant

imprisonment for a period of two (2) and a fine of $10,000 for a total penalty of imprisonment of five (5) years and a fine of $10,500. Mr. Jones will also be subject to the provisions of the Victim and Witness Protection Act of 1982, and criminal assessment pursuant to Title 18, United States Code, Section 3013, if applicable. The $50.00 criminal assessment will be paid in full on the date MR. Jones enters his plea of guilty. Also, the United States will recommend to the Court at the time of final disposition that Mr. Jones be credited for time spent incarcerated in Butner, North Carolina for the psychiatric examination - a period of approximately 66 days - and that time he spent under so-called "house arrest" - a period of approximately 444 days, for a total of 510 days credit. The United States will not oppose Mr. Jones' petitioning the Court to credit his in-court appearance and trial time towards his time of incarceration.

4. Mr. Jones will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquires made of him. Mr. Jones will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same is deemed necessary. The United States agrees to create the opportunity for a dialogue to exist between Mr. Jones and certain officials in Monroe County. In any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Jones may have counsel present if he desires.

5. Mr. Jones will not be prosecuted in Giles

_____ _____

GROVER C. JONES, JR. Date Signed
Defendant

_____ _____

H. L. KIRKPATRICK,III Date Signed
Counsel for Defendant

County, Virginia, Mercer County, WV or Monroe County WV based on any testimony or evidence in or out of Court given by John or Joseph Whitlow prior to the signing of this agreement.

6. Nothing contained in any statement or testimony given by Mr. Jones pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by Mr. Jones. However, this agreement does not prevent Mr. Jones from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from an independent, legitimate source, separate and apart from that information and testimony being provided by him pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Jones for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of his failing to be fully forthright and truthful pursuant to paragraph 4 herein.

7. There have been no promises or representations whatsoever made to Mr. Jones by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Jones.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Jones' forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate. Mr. Jones has indicated to the United States that he will make motions concerning concurrent sentences, the limitation of probation and the imposition of a limited fine-- the United States will remain moot and not oppose these motions but reserves the right to address the Court concerning these motions if called upon by the Court to do such. If the Court decides to give Mr. Jones a period of probation, the United States will not oppose Mr. Jones seeking job employment and working outside the Southern District of West Virginia and within the continental United States.

8. If and/or when Mr. Jones petitions the West Virginia State Bar for reinstatement the United States will advise the State Bar of the nature and extent of Mr. Jones' forthrightness and truthfulness or failure to be forthright and truthful pursuant to this agreement. Mr. Jones' reasons for pleading to these two felony offenses are that in his opinion the offenses do not involve moral turpitude.

9. If either the United States or Mr. Jones violate the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

10. Following final disposition, the United States will move the Court to dismiss Counts Two, Three, Four and Five in Criminal No. 1:85-00080 as to Mr. Jones.

11. This written agreement constitutes the entire agreement between the United States and Mr. Jones in this matter. There are no agreements understandings, or recommendations as

to any other pending or future charges against Mr. Jones in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

DAVID A. FABER
United States Attorney
By:
RICHARD S. GLASER, JR.
Assistant United States Attorney

RSG/jro

As evidence by my signature at the bottom of the three pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.

_____ _____

GROVER C. JONES, JR. Date Signed

_____ _____

H. L. KIRKPATRICK, III Date Signed
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

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UNITED STATES OF AMERICA,

Plaintiff,

vs. June 4, 1986

CRIMINAL ACTION NO. 1:85-00080

GROVER C. JONES, JR.,

==========

HEARING ON MOTION TO ENFORCE PLEA AGREEMENT
BEFORE THE HONORABLE ELIZABETH V. HALLANAN.

APPEARANCES:

For the Plaintiff: MS. NANCY HILL
Assistant U.S. Attorney
United States Courthouse

For the Defendant: Mr. H.L. KIRKPATRICK, III
Attorney at Law
Ashworth & Kirkpatrick
P.O. Drawer AA
Beckley, WV 25801
and
MR. KEVIN BURGESS
Attorney at Law
P.O. Box 1145
Oak Hill, WV 25901

. . .

[irrelevant portions excluded]

WAYNE A. RICH, JR., was thereupon called as a witness on behalf of the United States of America and, after having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. HILL

Q Mr. Rich, what action, if any, did you take after this conversation with Mr. Glaser?

A I told Mr. Faber I didn't think Mr. Glaser ought to have anything else to do with the case and I told Mr. Glaser as far as I was concerned, the agreement was unacceptable but Dave had the final say since he was the U.S. Attorney.

Q Did you direct Mr. Glaser to take any action regarding the plea agreement?

A I believe I directed that he call Mr. Kirkpatrick and tell him it hadn't passed the mustard in the office.

Q Did he do that, to your knowledge?

A I think he told me he did.

May 23, 1986

Richard Robb, Mayor
City Building
South Charleston, West Virginia 25309

Re: Wayne and Regina Rich

Dear Richie:

We have been discussing the matter regarding the home constructed by your client, John Atkinson, d/b/a Custom Design and Construction, Inc. for my clients, Wayne and Regina Rich. You have had Mr. Dale Monk look at the property for the purposes of giving some estimates on repair or replacement of various items. You were kind enough to provide me with those items, together with his estimated costs. Whether these costs include labor or not is questionable in my mind.

I have reviewed the entire matter with my clients and I believe the following items must be considered before we can reach any kind of a compromise. On some of these items, I do not have any cost figures to give you at this time, but you should have your client examine them for the purposes of determining what cost he might attribute to them. My clients are insisting that at the very minimum these things be done to correct the problems in their house.

. . .

[irrelevant portions excluded]

5. My clients insist that your client return to them the parquet tile and ceramic tile which was taken from the house by Mr. Atkinson or his employees. That tile belonged to my client, was billed to them and the removal of same was not done with their permission. If it

is not returned promptly, I am afraid that my clients will proceed to discuss that matter with Charles King of the prosecutor's office. I hope we can avoid that circumstance.

After you have reviewed this matter and discussed it with your client, I would appreciate hearing from you.

Very truly yours,

Arthur T. Ciccarello

The Honorable Elizabeth V. Hallanan
U. S. District Judge
Southern District of West Virginia
P. O. Drawer 5009
Beckley, West Virginia 25801

Re: U.S. v. Grover C. Jones, Jr.,
Crim. Action No. 1:85-00080

Dear Judge Hallanan:

Pursuant to the court's order of June 10, 1986, and further the order of the court orally pronounced on June 12, 1986, I, Grover C. Jones, Jr., do hereby notify the court that I reject the plea bargain offered in this case and found to have been offered in this case by the U. S. Attorney. I request that my trial go forward on July 7, 1986.

Further, I have reached this decision based upon my own knowledge and experience in this case and otherwise, upon consultation with my counsel, Arthur T. Ciccarello and Robert P. Martin, and in light of the Court's order.

By way of further explanation it is my position that the agreement as found by the Court in its order of June 10, 1986, was not in fact or in law the complete and total bargain reached between myself and the U. S. Attorney. There were certain material elements omitted therefrom, in particular the issue as to credit for time served. I have this day confirmed all the above with my counsel, Arthur T. Ciccarello and Robert P. Martin, and instructed them to notify the U. S. Attorney orally and a copy of this letter has been mailed to the U. S. Attorney.

Your attention to this matter has been greatly appreciated.

Sincerely,
Grover C. Jones, Jr.

cc: Arthur T. Ciccarello, Attorney
David Faber, U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 1:85-00080

GROVER C. JONES, JR.

MEMORANDUM ORDER

I. Introduction

On June 3rd, 4th and 5th, 1986, Defendant Grover C. Jones, Jr., appeared in person, and by his appointed counsel, H. L. Kirkpatrick III and Kevin Burgess. The United Stats appeared through its counsel, Assistant United States Attorney Nancy C. Hill. The parties were before the Court to argue Defendant's motion to enforce an alleged plea agreement which Defendant claims he and his attorneys consummated between himself and the United States. During the course of the hearing Defendant also requested permission to argue his motion to dismiss the five-count mail fraud indictment pending against him on grounds that such dismissal was warranted due to alleged prosecutorial misconduct. The Court granted

this request and Defendant argued said motion at the conclusion of the evidentiary portion of the hearing on the motion to enforce the alleged plea agreement.

Defendant is co-counsel in his own behalf. Thus, Defendant argued in his own behalf and examined witnesses as did his appointed counsel.

Defendant moved the Court to close the hearing from the public. The United States did not oppose that motion.

The Court, considering the possible prejudice to the Defendant because of the subject matter of the motion to dismiss, granted Defendant's motion to close the hearing.

II. Facts Relevant to Defendant's Motions

On or about the middle of April, 1986, Assistant United States Attorney Richard S. Glaser (hereinafter AUSA Glaser) contacted defense counsel H.L. Kirkpatrick III to suggest the possibility of plea bargain discussions. On April 25, 1986 a meeting was conducted in the office of the United States Attorney in Beckley,

West Virginia. The following individuals attended: Defendant, Mr. Kirkpatrick, First Assistant United States Attorney Wayne A. Rich, Jr., (hereinafter FAUSA Rich) and AUSA Glaser. No plea agreement was reached during this meeting.

At Defendant's request another meeting was scheduled on May 2, 1986. That meeting was held with the following persons in attendance: Defendant, Mr. Kirkpatrick, AUSA Glaser, and United States Attorney for the Southern District of West Virginia David A. Faber (hereinafter USA Faber). This meeting was convened in the office of the United States Attorney at Beckley, West Virginia. By authorization of USA FAber, the meeting was secretly tape recorded. USA Faber testified that the recording was done because the United States believed the Defendant would appear unrepresented by his appointed counsel. Defendant points out that no attempt was made by the United States to discontinue the secret recording of conversations when it became

apparent that Defendant was represented by counsel at the meeting. The Court has reviewed this tape and notes that no plea agreement was consummated at this meeting. USA Faber, however, made statements during the meeting suggesting that the parties were close to a plea agreement and that the Defendant and himself should allow their respective attorneys to complete the negotiations. USA Faber analogized the situation to a civil case in which the parties are close to settlement and the final nuances should be done by the parties' attorneys. AUSA Glaser would represent USA Faber and Messrs. Kirkpatrick and Burgess would represent Defendant in further negotiations. Soon after the May 2, 1986 conference, AUSA Glaser allegedly telephoned Mr. Kirkpatrick to inform him that USA Faber was pleased with the results of the meeting and had developed some respect for Defendant who would no longer be simply a name on an indictment. Thereafter, an indeterminate but prodigious number of telephone

conferences were held between Mr. Kirkpatrick and AUSA Glaser.

On May 20, 1986, another meeting was held in the office of the United States Attorney at Beckley with the following persons in attendance: Defendant, AUSA Glaser and Defendant's minor son, AUSA Glaser presented Defendant with a letter setting forth a proposed plea agreement. The parties first discussed a plea to one count of mail fraud. Defendant, however, rejected this proposal. Consequently, it was suggested that Defendant might plead to misprision of a felony and a weapons violation, carrying with them a maximum prison exposure of three (3) years and two (2) years respectively. Other possible plea agreement terms were discussed. Defendant, for example, suggested that he receive credit for prison time for the period he was committed to the Federal Correctional Institution at Butner, North Carolina and for his time spent on a bond which restricted his activities. USA Faber had

previously expressed skepticism as to whether his office or the Court could grant the credit for bail time.

AUSA Glaser contacted by telephone USA Faber who was out of town serving as a reservist in one of the military branches. The evidence indicates that USA Faber had no objection to Defendant pleading to the two aforesaid felonies so long as a factual basis existed for each. But, USA Faber conditioned his approval of other unrelated terms in the agreement upon the approval of the agreement by FAUSA Rich.

The evidence indicates that AUSA Glaser must have interpreted USA Faber's telephone responses to mean that the essence of the two-felony plea agreement was approved. AUSA Glaser telephoned Defendant's residence after he spoke with USA Faber. Defendant's ex-wife, Patricia Jones, answered the phone. Patricia Jones testified that AUSA Glaser indicated to her that he had "good news" for Defendant. Defendant then spoke with AUSA Glaser. Defendant contends

that AUSA Glaser then telephoned Defendant's attorney H.L. Kirkpatrick at approximately 11:30 p.m. on the night of May 20, 1986. Mr. Kirkpatrick testified that AUSA Glaser indicated that the parties had an agreement. Mr. Kirkpatrick believes that AUSA Glaser stated: "Buddy, we have a deal." or something very close to those words.

On May 21, 1986 the following persons met at the United States Attorney's Office in Beckley: Defendant, Mr. Kirkpatrick, Mr. Burgess and AUSA Glaser. More details of the plea agreement were discussed.

On May 21, 1986 FAUSA Rich and Assistant United States Attorney Charles T. Miller (hereinafter AUSA Miller) reviewed the plea agreement and independently concluded that many provisions were unacceptable. It was their opinion that certain provisions were of questionable legality (e.g. recommendation for credit for time on bail) and other terms were inappropriate. At FAUSA Rich's direction, AUSA

Glaser telephoned Mr. Kirkpatrick on May 22, 1986 and informed him that there was no plea agreement. On May 21 or 22, 1986 Judge Charles M. Lobbin and Trooper Charles Coburn and Postal Inspector William Pauer were consulted concerning the proposed plea agreement by representatives of the United States Attorney's Office.

After AUSA Glaser informed Mr. Kirkpatrick that there was no plea agreement, AUSA Miller telephoned Mr. Kirkpatrick to inquire concerning the alleged plea agreement. This telephone conversation was secretly tape recorded by AUSA Miller.

It should also be noted that during the negotiations described herein, AUSA Glaser telephoned the Honorable Charles H. Haden II, Chief Judge of the Southern District of West Virginia and requested that he consider scheduling a hearing on the proposed plea agreement for the purpose of accepting guilty pleas and sentencing the Defendant, inasmuch as

the Honorable Elizabeth V. Hallanan, United States District Judge for the Southern District of West Virginia, was out of town. Prior to contacting Chief Judge Haden and before Judge Hallanan departed to go out of town, AUSA Glaser contacted Theodore P. Kennedy, Jr., who is a Law Clerk employed by Judge Hallanan. AUSA Glaser requested that Mr. Kennedy ask Judge Hallanan if she would discuss a proposed plea with the parties. Mr. Kennedy relayed the message to Judge hallanan who instructed Mr. Kennedy to inform AUSA Glaser that she would make no reply until the parties submitted to her a written letter signed by Defendant and all counsel describing exactly what they were requesting from her Court. Mr. Kennedy conveyed Judge Hallanan's message in those precise terms to AUSA Glaser. The Court never received any letter.

Defendant contends that all of the aforesaid facts as well as previous conduct of the Office of the United States Attorney amounts

to prosecutorial misconduct on the part of the Office of the United States Attorney warranting dismissal of the indictment against him. Specifically, Defendant argues that the aborted plea agreement process prejudiced him in at least the following ways: his attorneys have been unable to devote all of their energies to trial preparation Defendant ceased attempting to raise funds to employ private counsel of his choice; and witnesses who will testify in the upcoming trial have been prejudiced by having learned of the plea agreement negotiations, proposals, etc. Defendant also renews previous arguments that exculpatory materials were withheld from the grand jury which indicted him. The United States opposes and denies Defendant's claims. The Court notes that Defendant recently filed a motion to allow withdrawal of his appointed counsel on grounds that Defendant is no longer indigent and wishes to employ counsel of his own choice.

BEST AVAILABLE COPY

. . .

elevant portions excluded]

ings the Court to the issue of which

titute the essence of the plea

After laborious analysis the Court

that the following terms taken from

he parties' May 19, 1986 drafts and

ly the following terms taken from that

nstitute the essence of the agreement

by USA Faber and are the sole terms

are sufficiently certain enough to

e:

Kirkpatrick, III, Esq.

rth & Kirkpatrick

Drawer AA

ey, West Virginia 25801

United States v. Grover C. Jones, Jr.
Criminal No. 1:85-00080 (USDC SDWVa)

Mr. Kirkpatrick:

s will confirm our conversations with regard your client, Grover C. Jones, Jr. ereinafter "Mr. Jones"). As a result of these nversations, it is agreed by and between the ited States and Mr. Jones as follows:

1. Mr. Jones is charged in a five-count ndictment as follows: Counts One through Five harge Mr. Jones with violations of 18 U.S.C., ections 1341 and 2 (mail fraud).

Mr. Jones agrees to waive his right pursuant to Rule 7 under Rules of Criminal Procedure to be indicted by a grand Jury and agrees to be charged by Information with violations of two following felonies:

a) 18 U.S.C. 4 (misprison (sic) of felony) and
b) 18 Appendix 1202 and 2 (aiding and abetting a felon in possession of a shotgun).

3. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 U.S.C. Section 4 is imprisonment for a period of three (3) years and a fine of $500.00. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 Appendix 1202 and II is imprisonment for a period of two (2) and a fine of $10,000 for a total penalty of imprisonment of five (5) years and a fine of $10,500. Mr. Jones will also be subject to the provisions of the Victim and Witness Protection Act of 1982, and criminal assessment pursuant to Title 18, United States Code, Section 3013, if applicable. The $50.00 criminal assessment will be paid in full on the date Mr. Jones enters his plea of guilty.

4. Mr. Jones will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquires made of him. Mr. Jones will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same is deemed necessary.

6. Nothing contained in any statement or testimony given by Mr. Jones pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by Mr. Jones. However, this agreement does not prevent Mr. Jones from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from an independent, legitimate

source, separate and apart from that information and testimony being provided by him pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Jones for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of his failing to be fully forthright and truthful pursuant to paragraph 4 herein.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Jones' forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate. Mr. Jones has indicated to the United States that he will make motions concerning concurrent sentences, the limitation of probation and the imposition of a limited fine-- the United States will remain moot and not oppose these motions but reserves the right to address the Court concerning these motions if called upon by the Court to do such. If the Court decides to give Mr. Jones a period of probation, the United States will not oppose Mr. Jones seeking job employment and working outside the Southern District of West Virginia and within the continental United States.

9. If either the United States or Mr. Jones violate the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

10. Following final disposition, the United States will move the Court to dismiss Counts Two, Three, Four and Five in Criminal No. 1:85-00080 as to Mr. Jones.

11. This written agreement constitutes the entire agreement between the United States and Mr. Jones in this matter. There are no agreements understandings, or recommendations as

to any other pending or future charges against Mr. Jones in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

DAVID A. FABER
United States Attorney
By:
RICHARD S. GLASER, JR.
Assistant United States Attorney

RSG/jfs

As evidence by my signature at the bottom of the three pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.

The terms found valid by the Court are the terms involving the basic felonies and agreements likely to be consistent with a plea to those felonies. Other inconsistent or unrelated terms made conditional have been deleted from the May 19, 1986 draft quoted above as being uncertain and not approved by USA Faber by telephone or otherwise and are not recognized by this Court as part of the plea agreement.

Therefore, to the extent enumerated supra Defendant's motion to enforce the plea agreement hereby is ORDERED GRANTED. The Court makes no comment or predictions concerning whether it

will approve the plea agreement found by the Court to exist if the Defendant seeks to plead guilty pursuant to said agreement.

If the Defendant wishes to proceed on the plea agreement found to exist by the Court, he shall forthwith and no later than two days after entry of this Order notify the Court in writing of his intent to proceed on the plea agreement. Said letter should be signed by the Defendant and his counsel. The Defendant, of course, is free to reject the agreement reached between himself and the United States as found by the Court.

* * *

[irrelevant portions excluded]

IT IS SO ORDERED this 10th day of June, 1986.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA,
Plaintiff,

VS: June 12, 1986
CRIMINAL ACTION NO. 1:85-00080

GROVER C. JONES, JR.,
Defendant.

HEARING TO DISMISS APPOINTED COUNSEL
BEFORE THE HONORABLE ELIZABETH V. HALLANAN

APPEARANCES:

For the Plaintiff: MS. NANCY HILL
Assistant U.S. Attorney
United States Courthouse
500 Quarrier Street
P. O. Box 3234
Charleston, WV 25302

For the Defendant: MR. H.C. KIRKPATRICK, III
Attorney at Law
Ashworth & Kirkpatrick
P.O. Drawer AA
Beckley, WV 25801
and
MR. KEVIN BURGESS
Attorney at Law
P.O. Box 1145
Oak Hill, WV 25901
and
MR. ROBERT PAUL MARTIN
Lewis, Ciccarello & Friedberg
L & S Building
810 Quarrier Street
P. O. Box 1746
Charleston, WV 23326

P R O C E E D I N G S

. . .

[irrelevant portions excluded]

MR. MARTIN: Your Honor, last night I talked with First Assistant United States Attorney Wayne Rich about the matter and I told him I wanted as much time as I could because of the history of this case and he suggested that two to three weeks would not be unreasonable and I agreed that we could, we could get ready if, if we gave a very positive push to within the three weeks. I talked with Miss Hill this morning and she, her understanding was two to three weeks and sometime in that period.

. . .

[irrelevant portions excluded]

MR. MARTIN: With regard to your order of June 10, 1986, you provided in there that you found that a plea agrement situation had been reached between the United States and Mr. Jones and you very specifically detailed that agreement in that order. You likewise, in that order,

required, Your Honor, that the defendant advise this Court in writing two days after the order was entered as to whether or not the defendant wished to accept that offer and go forward with a plea.

Inasmuch as my client tendered that order to me yesterday and inasmuch as we have asked the Court for a continuance in order to ascertain the strength and, or relatiave weaknesses of the United States' case, in the underlying case, I would like to ask the Court that you extend that deadline for Mr. Jones' acceptance or rejection of that plea for some period of time that you determine to be reasonable in order that we can look a little more into this case in order that our client is not prejudiced by the loss of a potentially good deal that has been offered.

MS. Hill: Your Honor, I told Mr. Martin before the hearing that if the Court would grant a continuance in this case of three weeks that we would agree to an extension of that deadline

until noon Monday, understanding that a plea agreement acceptance will be in writing to our office and to the Court by noon Monday.

THE COURT: Give me that last again. He understanding what?

MS. HILL: That if the plea agreement would be accepted, it will be done in writing and provided to the Court and our office by noon Monday. In other words, we agree to extend the deadline until noon Monday if that was, of course, agreeable with the Court.

THE COURT: All right.

MR. MARTIN: That is my understanding of our discussion.

THE COURT: All right. Is that a reasonable period of time?

MR. MARTIN: Yes, Your Honor.

THE COURT: All right, I will grant the motion, then, with the understanding that it will be resolved one way or another by noon Monday.

MR. MARTIN: Right. Thank you, Your Honor.

. . .

[irrelevant portions excluded]

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

UNITED STATES OF AMERICA,

PLAINTIFF,

vs. CRIMINAL NO. 1:85-00080

GROVER C. JONES, JR.,

DEFENDANT.

APPLICATION OF DEFENDANT FOR SUBPOENAS TO BE ISSUED FOR SERVICE AT GOVERNMENT EXPENSE ON NAMED WITNESSES

Comes now the defendant pursuant to Rule 17(b) of the Federal Rules of Criminal Procedure and respectfully requests the issuance of witness subpoenas at government expense for service upon witnesses named in the witness list attached hereto and made a part hereof as "Exhibit A".

. . .

[irrelevant portion excluded]

EXHIBIT "A"

DEFENDANT'S WITNESSES TO BE SUBPOENAED

(66) WAYNE RICH: Assistant U. S. Attorney, Charleston, West Virginia. Will be questioned as to mishandling of exculpatory tape at Ballard

residence to show chain in handling of tape. Will also prove indictment of defendant and the incarceration at Butner Federal Correctional Institution. Was politically motivated.

GROVER C. JONES, JR.

By Counsel

BY:_____

H. L. Kirkpatrick III
P. O. Drawer AA
Beckley, West Virginia 25801

W. Dale Greene
105 Pennsylvania Avenue
Charleston, West Virginia 25301

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA,

PLAINTIFF,

vs. CRIMINAL NO. 1:85-00080

GROVER C. JONES, JR.,

DEFENDANT.

MOTION TO PRECLUDE THE PARTICIPATION OF FIRST ASSISTANT UNITED STATES ATTORNEY, WAYNE A. RICH, JR., FROM TRIAL UPON THE ABOVE-STYLED INDICTMENT

The defendant, Grover C. Jones, Jr., comes before the Court and respectfully moves that the Court enter an order precluding First Assistant United States Attorney, Wayne A. Rich, Jr., from participation in trial upon the above-styled indictment, and states in support of said motion that throughout the previous proceedings, upon this indictment and also upon Indictment 1:85-00043, said attorney has evidenced blatant animosity and hostility towards this defendant; that the role of prosecuting attorney is imbued with a quasi-judicial function requiring any prosecuting attorney to proceed in the prosecution of the government's case in a fair

and impartial manner towards all parties including the defendant; that the actions of said Assistant United States Attorney have exceeded the bounds of proper zealous representation of the government and have become personally vindictive as to this defendant; that for these reasons, for the Court to permit said attorney to participate in the proceeds further constitutes a denial of this defendant's right to due process and equal protection under the Constitution of the United States of America.

GROVER C. JONES, JR.

BY COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA,

vs.

CRIMINAL ACTION NO. 1:85-00080

GROVER C. JONES, JR.,

RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION TO PRECLUDE THE PARTICIPATION OF FIRST ASSISTANT UNITED STATES ATTORNEY, WAYNE A. RICH, JR., FROM TRIAL UPON THE ABOVE STYLED INDICTMENT

Now comes the United States of America by Nancy C. Hill, Assistant United States Attorney for the Southern District of West Virginia, and in response to defendant's Motion to Preclude the Participation of First Assistant United States Attorney, Wayne A. Rich, Jr., From Trial Upon the Above-styled Indictment, says as follows:

1. The United States opposes defendant's motion as being without factual or legal basis.

2. Although the due process clause of the United States Constitution protects a defendant from prosecutorial vindictiveness and

retaliation for the exercise of his constitutional rights, such a situation has not occurred under the facts and circumstances of this case. See United States v. Vaughn, 565 F.2d 283 (4th Cir. 1977); North Carolina v. Pearce, 395 U.S. 711 (1969); and Blackledge v. Perry, 417 U.S. 21 (1974).

UNITED STATES OF AMERICA

By: NANCY C. HILL
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA,

vs. CRIMINAL ACTION NO. 1:85-00080

GROVER C. JONES, JR.,

ORDER

This matter is before the Court via the motion of Defendant, Grover C. Jones, Jr., to preclude the participation of First Assistant United States Attorney Wayne A. Rich, Jr., (hereinafter FAUSA Rich) from participating in the trial of the above-styled case. Defendant cites no case law in support of his motion. He contends, however, inter alia that FAUSA Rich has personal animosity toward him and that FAUSA Rich is overzealous to the degree that if FAUSA Rich participates in the trial of this matter, Defendant will be denied his right to due process of law and equal protection of the law as guaranteed by the Constitution of the United States. Although Defendant fails to be

specific, the Court assumes he is speaking of rights guaranteed by the Fifth Amendment to the aforesaid Constitution.

The United States opposes Defendant's motion and cites several cases in support of its position. This Court finds the case of United States v. Vaughan, 565 F.2d 283 (1977) cited by the United States persuasive. Although the facts in Vaughan specifically involve statements made during plea negotiations the Vaughan Court appears to propose generally that in order to demonstrate prosecutorial vindictiveness rising to the level of a Constitutional infringement the Defendant must show retaliatory or vindictive motive behind any conduct complained of by Defendant. United States v. Vaughan, 565 F.2d 284. Nothing in Defendant's motion supports any alleged act by FAUSA Rich which was or is motivated (sic) by malice. Albeit FAUSA Rich has been a zealous advocate. Zealous advocacy by a prosecutor is not equal to vindictiveness.

[irrelevant portion excluded]

Accordingly, Defendant's motion to disqualify FAUSA Rich from participating in the above-styled case is ORDERED DENIED.

THE CLERK IS DIRECTED TO MAIL A CERTIFIED COPY OF THIS ORDER TO ALL COUNSEL OF RECORD.

IT IS SO ORDERED this 20th day of June, 1986.

ENTER;

ELIZABETH V. HALLANAN
United States District Judge

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

WAYNE A. RICH, JR. and
REGINA A. RICH,

Plaintiffs,

FILED
IN KANAWHA CIRCUIT
COURT CLERK'S OFFICE
AUG 20 1986

vs. CIVIL ACTION NO. 86-C-3224

CUSTOM DESIGN AND CONSTRUCTION,
INC., a West Virginia corporation,

Defendant.

COMPLAINT

1. Plaintiffs and Defendant entered into a certain Construction Contract dated April 30, 1985, whereby Defendant, also known as "Builder", agreed to build and construct in a good and workmanlike manner a new residence building upon the lands of Plaintiff located at 1703 Woodvale Road, Charleston, West Virginia 25314;

2. For and in consideration of the construction of said residence, the Plaintiffs agreed to pay unto the Defendant the sum of $156,400.00, as provided for in Article III, Section 1 of said Contract;

3. That under and by virtue of the terms of

said Agreement of April 30, 1985, the Defendant agreed to commence work on or before May 13, 1985, and agreed that the work shall be completed on or before November 15, 1985;

4. That said residence was to be constructed in accordance with plans and specifications consisting of 16 pages, as authorized and agreed to between the Plaintiff and the Defendant;

5. Under Article I, Section 1, of said Contract the Defendant agreed to build and construct the residence unit "in a good and workmanlike manner";

. . .

[irrelevant portions excluded]

17. As a result of the Defendant's breach of the Agreement of April 30, 1985, the Plaintiffs have been deprived of their property; they have been required to expend substantial sums of money in payment of interest on monies borrowed for the construction of the residence; that Plaintiffs have been required to make real estate payments on their other home, inasmuch as they have been unable to move into the new

residence and they have been subjected to annoyance, inconvenience and stress as a result of the actions, omissions and negligence of the Defendant.

18. That further the Defendant has caused to be filed in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, a certain Mechanics' Lien against the property of the Plaintiffs, which said Mechanics' Lien is baseless and constitutes slander of title as against the title to the real estate of the Plaintiffs.

P R A Y E R

WHEREFORE, your Plaintiffs therefore pray that they be granted Judgment in their favor and against the Defendant in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00); that the Court order the removal of the Mechanics' Lien as against the property of the Plaintiffs and thereby clear the title of the real estate of the Plaintiffs, and that they be granted such other, further and general relief as to this

Court may seem proper.

WAYNE A. RICH, JR. and
REGINA A. RICH
By Counsel

LEWIS, CICCARELLO & FRIEDBERG

By_____
Arthur T. Ciccarello
700 One Valley Square
P. O. Box 1746
Charleston, West Virginia 25326

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

WAYNE A. RICH, JR.
and REGINA A. RICH,

Plaintiff,

F I L E D
IN KANAWHA CIRCUIT
COURT CLERK'S OFFICE
SEP 4 1986

Vs. CIVIL ACTION NO. 86-C-3224

JOHN ATKINSIN, INC.
(Formerly Custom Design
& Construction, Inc.)

Defendant.

The Defendant, John Atkinson, Inc. formerly Custom Design & Construction, Inc., a West Virginia Corporation Answers the above Plaintiffs' Complaint and files a counter-claim as follows:

A N S W E R

1. The Defendant admits the allegations of Paragraph 1 of the Plaintiffs' Complaint.

2. The Defendant admits in part the allegations of Paragraph 2, regarding consideration and adds that Article III, Section of the Contract also states that the sum of $156,400.00, was "subject to additions and deductions by change order or as otherwise

provided herein," all of which occurred in this project.

3. The Defendant admits in part the allegations of Paragraph 3, regarding the commencement and completion dates and adds that Article II of the Contract establishing these dates allows for extension of the completion date to, among other things change orders, availability of material and other causes beyond the builder's control have caused by the Plaintiffs, which led to delay.

. . .

[irrelevant portions excluded]

17. The Defendant denies the allegations of Paragraph 17 of the Plaintiffs' Complaint and states that any deprivation of the subject dwelling has been of the Plaintiffs' own volition evidenced by their having never at any time prior or since the contract date of April 30, 1985, placing their present residence at 3707 Virginia Avenue, S. E. in Charleston on the market for sale.

18. The Defendant admits to filing a

Mechanic's Lien against the subject property and denies the baselessness or slander of such action as evidenced by action to enforce this lien.

Having answered the Plaintiffs' Complaint, the Defendant Prays the Plaintiffs case be dismissed and files the following Counterclaim.

C O U N T E R C L A I M

COUNT I

1. The Counterclaimant, John Atkinson, Inc., represents that it is a corporation established under the laws of West Virginia as Custom Design & Construction, Inc. on September 1, 1976, and amended November 12, 1985, for purposes of changing the corporate name to John Atkinson, Inc.

2. The Counterclaimant is a general contractor engaged in the business of home and commercial construction with its principal office at One McDavid Lane in Charleston, West Virginia.

3. The Counterdefendants, Wayne A. Rich, Jr.

and Regina A. Rich, his wife, are residents of Kanawha County, West Virginia, at 3707 Virginia Avenue, S. E. in Charleston.

. . .

[irrelevant portions excluded]

COUNT V

1. The Counterclaimant, John Atkinson, Inc., reasserts in their entirety all of the allegations stated in Paragraphs I and 2 of the preceeding Count IV of this Counterclaim.

2. Due to marital dissension between Mr. and Mrs. Rich suggesting a potential division of the marital assets the Counter-defendants have fraudulently sought to enlarge their marital assets at the expense of the Counterclaimant.

P R A Y E R

For this fraud and deceit through which Mr. and Mrs. Rich sought at its expense and detriment, the Counterclaimant prays that it be awarded: (a) $55,396.67 due for the contracted work plus interest from January 1, 1986; (b) $2,500.00 for work completed and uncompensated plus interest from February 1, 1986; (c)

$5,000.00 for its President's time; (d) $100,000.00 for damages to its credit; (e) $100,000.00 punitive damages; (f) $75,000.00 for damages to its reputation; and (g) all attorney fees, Court costs and other costs associated in bringing this action.

JOHN ATKINSON, INC.
By Counsel

RICHARD A. ROBB
1207 Quarrier Street
Charleston, West Virginia 25301
Counsel for Defendant-Counterclaimant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

UNITED STATES OF AMERICA,

vs. Criminal Action No. 1:85-00080

GROVER C. JONES, JR.,

Defendant.

MOTION TO WITHDRAW

TO THE HONORABLE ELIZABETH V. HALLANAN, JUDGE OF SAID COURT:

Comes now, Lewis, Ciccarello & Friedberg and Arthur T. Ciccarello and Robert P. Martin and respectfully pray that the Court grant counsel leave to withdraw as counsel of record in the above-referenced criminal proceeding, and in support thereof, do state and allege as follows:

1. That on the 7th day of May, 1987, the Defendant, Grover C. Jones, Jr., did appear in the offices of Lewis, Ciccarello & Friedberg and during a heated conversation with counsel raised questions surrounding alleged conflicts of interest existing between the representation by

counsel of the Defendant and other clients of counsel which the Defendant alleged were significant and created an irreconcilable conflict of interest reposing in counsel;

2. That counsel has diligently prosecuted an appeal on behalf of the Defendant, that this Court is well aware of, and that the same has been prosecuted through the Fourth Circuit Court of Appeals to the United States Supreme Court of Appeals and has appeared and otherwise dutifully discharged their duty as counsel of record for the Defendant, and in all stages thereof, the Defendant has failed to pay any costs of these proceedings which said costs have been substantial and borne solely by counsel of record. In addition, counsel would note that it secured an assignment of insurance benefits for their fee herein, and none of said fees have been deferred to date;

3. That the Defendant has made repeated and continuous unreasonable demands upon counsel throughout the entirety of these proceedings and

more frequently in the last few days;

4. That the Defendant has conducted himself in the offices of Lewis, Ciccarello & Friedberg in a loud and boisterous manner on occasion in the presence of other clients of the law firm and in the presence of other lawyers;

5. That the attorney/client relationship heretofore existing between the Defendant and counsel has been unalterably affected by the foregoing and the deterioration of the attorney/client relationship between the Defendant and his counsel;

6. That the Defendant has stated that the representation afforded him by Lewis, Ciccarello & Friedberg has not been adequate in his estimation and that Lewis, Ciccarello & Friedberg has failed to perform and render adequate legal services unto him;

P R A Y E R

WHEREFORE, counsel, Lewis, Ciccarello & Friedberg and Arthur T. Ciccarello and Robert P. Martin, respectfully pray that they be granted

leave to withdraw as counsel of record herein. That they further pray that the Court forthwith hold an in camera hearing before the Court without the presence of the government in order to protect the Defendant's rights and further in order that the rights of the Defendant are not prejudiced in any way by the withdraw of counsel and any statements or testimony elicited or given before the Court could be used in any way against this Defendant. That counsel further prays that this Motion and any Order or hearings or transcripts or other matters generated as a result hereof be sealed, and that they be granted such other relief as the Court may seem proper.

LEWIS, CICCARELLO & FRIEDBERG

Arthur T. Ciccarello
Robert P. Martin
Suite 700 - One Valley Square
Post Office Box 1746
Charleston, WV 25326

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BECKLEY

TRANSCRIPT OF PROCEEDINGS

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CRIMINAL ACTION NO. 1:85-00080
vs.	:	May 12, 1987
GROVER C. JONES, JR.,	:	
Defendant.	:	

EX PARTE HEARING

BEFORE THE HONORABLE ELIZABETH V. HALLANAN

APPEARANCES:

For the Defendant: MR. ARTHUR T. CICCARELLO
MR. ROBERT P. MARTIN
Attorneys at Law
One Valley Square
Charleston, WV 25301

P R O C E E D I N G S

THE COURT: We're were in the case of United States of America vs. Grover C. Jones, Jr., Criminal Action Number 1:85-00080, pursuant to

a motion to withdraw hereinbefore filed by counsel for the defendant on May 12, 1987. And by agreement, the subject matter of that motion was set for, for hearing at this time.

Let the record note the appearance of the defendant and his counsel, Mr. Ciccarello and Mr. Martin.

All right.

MR. CICCARELLO: Your Honor please, I apologize to the Court for having to take your time in this matter. However, because of some circumstances that came about, I felt it necessary to raise these matters before the Court in my exercise of my responsibilities to the Court.

Mr. Jones and I this morning, before this matter had been set, had the opportunity to sit down and discuss what I felt were some problems in representation aspects. And we have, more or less, cleared up those problems, Your Honor.

Knowing -- and I'm sure Your Honor knows in representing a client in criminal matters that

there is a certain amount of anxiety that attaches to the, to the thought of having to go to trial for the defendant and the exposure that he faces.

Mr. Jones and myself and Mr. Martin had a disagreement last week which resulted in, in some, some harsh words and in some statements that were made that I felt might cause some problems in the future as to representation of Mr. Jones, particularly in regard to some statements that were made in reference to a possible conflict of interest and things of this kind.

Mr. Jones this morning advised me that, that he really didn't mean to say what he said, but he was under some pressure at the time, and I understand the pressure that he was under ,and does want us to continue representing him and we have no problems with representing him as long as those matters have been resolved.

What we thought we might do, if the Court would agree with us, is to submit to the Court

a written memorandum executed by both counsel and by Mr. Jones that resolves any problems that we may have in writing so that the Court would have it of record in this proceeding.

If that is satisfactory with the Court, we can resolve this matter without any further problem.

THE COURT: I'm not quite sure I understand what's going to be in the memorandum. I don't mean the details of it, but generally.

MR. CICCARELLO: Your Honor, one of the things that caused me to, to file the motion was Mr. Jones was aware that we represent and have represented in a civil action Mr. Wayne Rich who was an Assistant United States Attorney. It's a civil action involving construction of his private home.

In, in addressing a letter to me and to Mr. Martin, Mr. Jones had indicated that, that we represent the Assistant United States Attorney and that might possibly be a conflict.

I have explained to him our representation

of Mr. Rich and the limitation of that representation and I think he is satisfied that that representation has no bearing upon our representation of him in this particular criminal action.

Your Honor may know I've represented prosecutors, judges, and, and different people which I don't feel has any bearing upon my representation of a client in a criminal case.

I will exercise my responsibilities to the best of my ability, and I think Mr. Jones is satisfied of that now and that is no problem. But I thought perhaps something ought to be on the record in the form of a written memo so that there wouldn't be any problem later on about any raising of any conflict in this particular issue.

One of the other matters that, that came about in this letter that Mr. Jones had written to Mr. Martin and myself had to do with our alleged representation of the United States Fire and Casualty Company, which doesn't have

anything to do with this, really, but I raise it because we also represent his wife in a personal injury case where USF&G is the insured.

Our representation of USF&G comes about by reason of the fact that we had previously represented the ex-sheriff of Kanawha County in a civil matter where a judgment was taken and paid by the County Court of Kanawha County. The County Court of Kanawha County then sued the sheriff, the ex-sheriff for contribution on the judgment and sued his bonding company also.

And under the terms and provisions of his bond, he has to provide representation for his bonding company, so our representation of USF&G is just ancillary to our representation of the ex-sheriff.

Mr. Jones has, likewise, agreed that he doesn't believe that that has any problems in our representation of him in this criminal matter.

So, those matters, Your Honor, have been resolved and I feel that our relationship now

one to the other can operate effectively and we can be prepared and ready for trial on the trial date.

THE COURT: All right, Mr. Jones, I take it your presence here and having heard the statement of your counsel that you concur in his remarks; is that correct?

THE DEFENDANT: Yes, Your Honor, with one, one modification.

I know that Mr. Ciccarello meant what he said and understood it to be that when he said that I had represented that I had said things that I didn't mean in the communication, I want the record to clarify that when I wrote the letter, I was sincere about but this morning when he explained to me the relationship with he and Mr. Rich and his representing the insurance company that it's clarified to my own understanding and even though the letter was written in good faith, I now understand what his position is and we're on good terms about it and 1 have no problems with it.

THE COURT: All right. It seems to me it would be appropriate, if this is the desire of, of Mr. Jones and his counsel, that you now submit, tender to the Court an order withdrawing your motion.

Is that appropriate and agreeable?

(Whereupon, counsel and the defendant indicated an affirmative response.)

THE COURT: All right, let the record show that everybody nodded their assent.

All right, if there is nothing further, then, this matter is concluded.

MR. CICCARELLO: Your Honor, I apologize for the time we had to take of the Court.

(Whereupon, at 10:45 a.m. the hearing was concluded.)